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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 301

PAUL MOSER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1950.

CERTIORARI GRANTED JANUARY 2, 1951.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition #458512

In the Matter of the Petition of PAUL MOSER to Be Admitted to Become a Citizen of the United States of America, UNITED STATES OF AMERICA, Appellant; PAUL MOSER, Appellee

STATEMENT UNDER RULE XV

The United States of America appeals from an order of the United States District Court, Eastern District of New York (Honorable Harold M. Kennedy, District Judge), dated July 21, 1949, admitting Paul Moser, the appellee, to United States citizenship. The petition for naturalization was filed on March 31, 1948, in the office of the Clerk of the United States District Court, Eastern District of New York. The final hearing was had on July 21, 1949, on which date the order appealed from was dated and filed. The notice of appeal herein was filed on September 13, 1949. There has been no arrest, either of person or property, no bail, and no attachment. No question has been referred to a Commissioner, or to a Master, or to a Referee. The appellee herein, the petitioner below, appeared in the District Court by his attorney, Morris E. Vogel, Esquire. There has not been any change in the parties to this action.

[fol. 2] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Petition #458512

In the Matter of the Petition of PAUL MOSER to Be Admitted to Become a Citizen of the United States of America, UNITED STATES OF AMERICA, Appellant; PAUL MOSER, Appellee

NOTICE OF APPEAL

Notice is hereby given that United States of America hereby appeals to the Court of Appeals for the Second Circuit from the order of the United States District Court for the Eastern District of New York granting the petition

of the above named Paul Moser to be admitted to become a citizen of the United States of America in so far as said order admitted the said Paul Moser as a citizen of the United States of America, which order was dated, entered and filed herein on July 21, 1949.

Dated: Brooklyn, New York, September 13, 1949.

[fol. 3] J. Vincent Keogh, United States Attorney, Eastern District of New York, Attorney for United States of America, Appellant, 521 Federal Building, Brooklyn, New York.

To Hon. Percy G. B. Gilkes, Clerk, U. S. District Court; Morris E. Vogel, Esquire, 551 Fifth Avenue, New York 17, New York, Attorney for Paul Moser.

[fol. 4] IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

ORDER APPEALED FROM

Date: June 8, 1949

UNITED STATES OF AMERICA,
United States District Court, ss:

Upon consideration of the petitions for naturalization listed on List No. — sheet(s) 1 to 2 dated June 8, 1949, presented in open Court this 21st day of July, A. D., 1949, it is hereby ordered that each of the said petitions be, and hereby is, denied, except those petitions listed below.

Recommendation of Designated Officer Is Disapproved as to the Petitions Listed Below, and each of said petitioners so listed having appeared in person, it is hereby ordered that each of them be, and hereby is, admitted to become a citizen of the United States of America. Prayers for change of name listed below granted, except in petition(s) No. —.

Petition No.	Name of Petitioner
1 45812	Paul Moser

It is further ordered that petitions listed below be continued for the reasons stated.

By the Court.

Harold M. Kennedy, U. S. D. C. Judge.

3

Petition for Naturalization No. 330801

DUPLICATE (To accompany monthly report on Form M-ii)

UNITED STATES OF AMERICA

No. 330801

PETITION FOR NATURALIZATION

[Oa] Alienized Person, under Sec. 310(a) or (b), 311 or 312, of the Nationality Act of 1940 (54 Stat. 1144-1145).

458512

To the Honorable the D. C. District Court Eastern District at

This petition for naturalization, hereby made and filed pursuant to Section 310(a) or (b), of the Nationality Act of 1940, respectfully shows:

(1) My full, true, and correct name is [redacted]

(2) My present place of residence is [redacted] (Street) (3) My occupation is Civil Engineer

(4) I am 29 years old. (5) I was born on September 16, 1911 (Year) in Biel, Switzerland (or alien) (Country)

(6) My personal description is as follows: Sex male; color wh; complexion fair; color of eyes brn, color of hair brn, height 6 feet 0 inches, weight 168 pounds; visible distinctive marks scar over right eye; race wh; present nationality Swiss

(7) I am married; the name of my wife or husband is Mary; we were married on October 19, 1940 (Year)

at New York, N.Y.; he or she was born at Lidlo, South Isl. N.Y. (Country) on October 16, 1914 (Year)

[redacted] (City or town) (State) 27 (Month) (Day) (Year) [redacted] and now resides at

[redacted] (Number) (Street) (City or town) (State)

[redacted]; or became a citizen by Birth

(7a) (If petition is filed under Section 311, Nationality Act of 1940) I have resided in the United States in marital union with my United States citizen spouse for at least 1 year immediately preceding the date of filing this petition for naturalization.

(7b) (If petition is filed under Section 312, Nationality Act of 1940) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof; and such husband or wife is regularly stationed abroad in such employment. I intend in good faith to take up residence within the United States immediately upon the termination of such employment abroad.

(8) I have 1 children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows:

Theodore, m, July 5, 1941; born and resides at New York, N.Y.

(9) My last place of foreign residence was Biel/Bienne, Switzerland (Country) (10) I emigrated to the United States from Montreal, Canada (Country) (11) My lawful entry for permanent residence in the United States was at Rouses Point, N.Y. under the name Paul Moser on December 29, 1937 (Month) (Day) (Year) the D.A.H. SS (Name of vessel) as shown by the certificate of arrival attached to this petition.

(12) Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
PORT	DATE (Month, day, year)	VESSEL OR OTHER MEANS OF CONVEYANCE	PORT	DATE (Month, day, year)	VESSEL OR OTHER MEANS OF CONVEYANCE

UNITED STATES DISTRICT COURT
Eastern District of New York
Exhibit 13 in evidence
Date June 9, 1949
[signature]

(13) (Declaration of intention) (14) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States. (15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. (16) I am able to speak the English language (unless physically unable to do so). (17) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (18) I have resided continuously in the United States of America for the term of 3 year... at least immediately preceding the date of this petition, to wit: since December 29, 1937 (Month) (Day) (Year) (19) I have not heretofore made petition for naturalization

number [redacted] on [redacted] (Month) (Day) (Year) at [redacted] (City or town) (County) (State) in the [redacted] (Name of court)

Court, and such petition was dismissed or denied by that Court for the following reasons and causes, to wit: [redacted]

[redacted] and the cause of such dismissal or denial has since been cured or removed.

(20) Attached hereto and made a part of this, my petition for naturalization, are a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States for permanent residence (if such certificate of arrival be required by the naturalization law), and the affidavits of at least two verifying witnesses required by law.

(21) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to [redacted]

(22) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name: SO HELP ME GOD.

[redacted] (Full true and correct signature of petitioner, without abbreviation)

Form M-305
U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
(Edition of 1-12-44)

o16—19460

5

330801

4

AFFIDAVIT OF WITNESSES

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Walter J. Grossenbacher my occupation is Head of cable dept.

I reside at 1814 Metropolitan Ave., Parkchester, N.Y.
(Number and street) (City or town) (State)

My name is Joseph Marzioti my occupation is office clerk

I reside at 120-45 197 St. St. Albans, L.I. N.Y.
(Number and street) (City or town) (State)

I am a citizen of the United States of America. I have personally known and have been acquainted in the United States with PAUL MOSER

, the petitioner named in the petition for naturalization of which this affidavit is a part, since January 1, 1938
(Month) (Day) (Year)

to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and I have personal knowledge that the petitioner is now and during all such period has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: SO HELP ME GOD.

(Signature of witness) (Signature of witness)

Subscribed and sworn to before me by the above-named petitioner and witnesses, in the respective forms of oath shown in said petition and affidavit, in the office of the Clerk of said Court at Brklyn, N.Y. this 27th day of March, Anno Domini 1942 I hereby certify that Certificate of Arrival No. 3-566741 from the Immigration and Naturalization Service, showing the lawful entry for permanent residence of the petitioner above named, has been by me filed with, attached to, and made a part of this petition on this date.

Clerk.

[SEAL]

By , Deputy Clerk.

ADJOURNMENTS

FROM—	TO—	REASONS	EXAMINER

FINAL HEARING

ADMITTED OR DENIED

Date , 19

Grounds

Examiner

C/A OK
Age 30

S. 310 (b)- Selective Service Act-
Fm BC 244 att.

1232

RESULT OF EXAMINATION

Deposit as required to cover residence, etc. { in from to Received
in None from to Received
in from to Received

STATEMENT OF APPLICANT

Absence from United States not alleged in petition Yes- Fm 1005 att.

Marital history not shown in petition M r/w 1st mar. ca. 1 ch. here

Anarchistic or subversive None Developed

Education Speaks English SR RR

Knowledge of Constitution and Government F

Attendance upon classes college grad.

Arrests, offenses, convictions, or other dispositions NCR in & out US except about 4 traffic viol. Fm 814 att.

Attachment to Constitution Yes

No org. except Boerer Club (Swiss Soc. Club)

STATEMENTS OF WITNESSES

	Witness Joseph Marzioti	Witness Walter J. Grossenbacher
Native	X	nat'd 2270-9-6-34
Naturalized		
Other		
Known petitioner since	~~xxxxxxxxxxxx~~ 1-1-38	1-1-38
Petitioner absent from United States	Yes as alleged	Yes as alleged
Petitioner arrested	No nor wit.	No nor wit.
Witness absent from United States	No	No

Recommendation of preliminary examiner C- Inv. abs., CR & pred ABR.

Recommendation of designated examiner

Alien Registration Receipt Card No. exhibited to me this date CA 132 att. Mar. 27, 1942

Petitioner and above witnesses sworn by me on

To return to office unused reentry permit obtained in 193 . , Preliminary Examiner.

Exh W's B/C & M/C. , Designated Examiner.

330801

2

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2-56

45851

June 15th, 1941.

U. S. Dept. of Justice
Immigration & Naturalization Service
Federal Building
Christopher Street
New York, New York

SPECIAL
1/17/41
cp

Gentlemen:-

Please note change of my address:-

OLD ADDRESS	NEW ADDRESS
451 E. 119th St.	32-55 81st St.
New York, N. Y.	Jackson Heights, L. I.

Very truly yours,

P. Moser

PAUL MOSER

PM:jm

RECEIVED
JAN 16 1941
IMMIGRATION & NATURALIZATION SERVICE
NEW YORK
N. Y.

3

6

COURT NO.
PET. NO. [illegible]

COURT ADJOURNMENTS				FINAL HEARING
FROM	TO	REASONS	EXAMINER	DENIED
C	6/5/44	Absent	JCB	Date 7-3-1945
C	1-22-45	Absent	JCB	Grounds Lack of Prosecution
C	3-19-45	absent	JCB	
C	4-30-45	Absent	JCB	(Orig. Pet.)
				Examiner [illegible]

DESIGNATED EXAMINER'S HEARINGS

FROM	TO	REASONS	EXAMINER
C	3/27/42	Dsw. abs; Dsw CRj ARR	H.J.G.
C	7/7/42	Dsw Abs.	H.J.G.
"	1-7/43	Facts to CT re. Standing by Petnr in his absence	[illegible]
"	4/4/43	[illegible]	[illegible]
C	11/6/43	F.B.O. Dsw. Ri [illegible] pre-Progi activities	H.J.G.
D	5-3-44		H.J.G.

DEPOSITIONS REQUIRED: No

ALL DEPOSITIONS MAILED TO COURT CLERK
FILED WITH

Date _____ ACTION TAKEN BY _____

DESIGNATED EXAMINER'S REPORT

Absences from U.S. Ro Dsw P/E

Arrests etc. Ro Dsw P/E

Witnesses verify above re absences, arrests etc. yes

Subversive activities, etc. no

Date 3/27/42 Initials H.J.G.

4-30-45

* D - Petr has failed to prosecute his petn for natz JCB.

READY FOR H.C.

H.J.G.

4

8

7

Application for Certificate of Arrival and Preliminary Form for Petition for Naturalization No. 458512

DENIED

33801-D

Form No. 609
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
(Rev. 1-46)

Form Approved
Budget Bureau No. 43-R078.43

458512

MAR 31 1948

Sec. 310(b)

Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization

2271-330801

For use in searching records of arrival:

RECORDS EXAMINED

Card index

Index books

Manifests

RECORD FOUND

Place

Name

Date

Manner

Marital status

Use Form N-215 or N-230 in issuing certificate of arrival on this application.

TO THE APPLICANT: DO NOT WRITE ABOVE THIS LINE. READ CAREFULLY AND FOLLOW THE INSTRUCTIONS ON LAST PAGE HEREOF.

Take or mail this application to:
IMMIGRATION AND NATURALIZATION SERVICE,
70 COLUMBUS AVENUE,
NEW YORK 23, N. Y.

Date November 10, 1947

I, Paul Moser (Name of applicant), residing at 71 Transverse Road (Number and street), Garden City (Name of applicant) Nassau (County) N.Y. (State), desire to file a petition for naturalization in the District (Name of court) Court at New York (City or town) N.Y. (State). I submit herewith a statement of facts to be used in filing such petition, three photographs of myself, each of which I have signed, and my declaration of intention (first paper), if one is required.

I hereby apply for a Certificate of Arrival (if required) showing my lawful entry into the United States for permanent residence. NOTE.—IF THIS APPLICATION IS ACCOMPANIED BY A DECLARATION OF INTENTION (FIRST PAPER) MADE SINCE JULY 1, 1929, ANSWER ONLY QUESTION NUMBER 5 ON THIS PAGE.

(1) I arrived in the United States through the port of ~~New York~~ Rouses Point N.Y. (City or town) under the name of Paul Moser on the vessel SS EXCAMBION 12/29/37 D+HRR (If otherwise than by vessel, show manner of arrival) on ~~10~~ 11 (Month) (Day) 1940 (Year)
(If arrival was through {Canada / Mexico} I arrived at the port of ..... ({Canada / Mexico}
on ..... (Month) (Day) (Year) on the vessel .....)

(2) (If arrival by ship) Name of steamship line was American Export Lines, Inc.
first, second, or third cabin Second (State which) I arrived as a passenger, stowaway, seaman, member of crew, or otherwise passenger

(3) The ticket on which I came to this country was bought at Biel (State which, giving nearest city) Switzerland (Country)

(4) The steamship ticket on which I traveled was in the name of Paul Moser

(5) I have been absent from the United States as follows: 11/26/45 to 12/29/45 N.Y.P.AA. Flight #NC88884
4/21/46 to 1/30/47 N.Y.-AirFrance Flight #61/02 Merely to be
6/20/48 to 8/31/48 Ogdensburg, N.Y. Car. Surg. 5/a-10/9/40.

I have NOT been absent at any other time.

(6) I was born in Biel (City or town) Switzerland (Country) on 9 (Month) 15 (Day) 1911 (Year)

(7) My father's full name is/~~was~~ Theodore Moser

(8) My mother's maiden name was Adeline Uhler

(9) (If a married woman) My maiden name was .....

(10) My last foreign residence was Biel Switzerland

(11) The place where I took the ship or train which landed me in the United States was Lisbon Portugal (Country)

(12) I traveled on (an immigration visa, a passport, or permit to reenter) Immigration visa

(13) I was ..... examined by United States immigration officers at Port of New York, N. Y. (City or town) (State or country)

(14) (If not examined, state why, and give the circumstances of your entry) .....

(15) The person in the United States to whom I was coming was Miss Mary Daniel

(16) The place in the United States to which I was going was New York, N. Y.

(17) The names of some of the passengers or other persons I traveled with, including members of my own family and their relationship to me, if any, are none

48—11811-9

[OVER]

5

9

Paul Paul Ney. 12/29/37.

(18) In what places in the United States have you resided during the past five years?

New York (City or town) N.Y. (State) From October (Month) 1940 (Year) to today (Month) (Year)

(City or town) (State) From (Month) (Year) to (Month) (Year)

(City or town) (State) From (Month) (Year) to (Month) (Year)

(19) What were the names, occupations, and addresses of your employers during the last 5 years?

Vulcan Steel Product Co. (Employer's name) 232 Varet St. (Number and street) Bklyn, N.Y. (City) 1940-41 Engr (Occupation)

Queens Model Engineering Co. 102-02 Corona Ave. Corona, N.Y. 1942-45 Mgr.

Maveg Inc. 24-16 Bridge Plaza So. L.I.C. N.Y. 1946-47 Mgr.

(20) Have you read the following oath of allegiance? yes Jan 3/31/48

I HEREBY declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God.

Are you willing to take this oath in becoming a citizen? yes

Of what country are you now a citizen or subject? Switzerland

(21) If necessary, are you willing to take up arms in defense of the United States? yes Jan 3/31/1948

Have you ever, during the time this country was at war, deserted the military or naval forces of the United States, or departed from the jurisdiction of the enrollment district or the United States to avoid draft into the military or naval forces of the United States? no

(22) How many times have you ever been married? once each.

(23) Have you ever been an inmate of an insane asylum? no

(24) Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation? yes

If so, give date, place and cause of arrest and disposition of each case

6/13/47 Speed, Fined, Traffic Court of Queens $5 no other CR.

(25) Have you ever been deported from the United States, or are deportation proceedings now pending against you? no

If so, state all facts

(26) During the last ten (10) years I have been a member of the following organizations and no other

Chamber of Commerce of Queens

Rac. Club. A.A.A.

(27) Was your father or mother ever a citizen of the United States? no If so, give full particulars

(28) Did you register under the Alien Registration Act of 1940? yes

If so, state the number of your Alien Registration Receipt Card 4906863 (Registration number)

(29) If male, did you register under the Selective Service (Draft) Law of 1940 as amended? yes

If so state your Draft Board No. 14 Located at New York (City) N. Y. (County) N.Y. (State)

Classified in class 4C 4A Reason for such classification

(30) Did you yourself fill out this form? yes If not, give the name and address of the person who did

(31) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States. I am not, and have not been for the period of at least 10 years immediately preceding the date of this statement, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. I am able to speak the English language, unless physically unable to do so. I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

I CERTIFY that all the statements made by me in this application and form are true to the best of my knowledge and belief.

IMPORTANT

Forward your Alien Registration Receipt card with this application.

Paul Russes. (Signature of applicant)

71 Transverse Road, (Address at which applicant receives mail)

Garden City, N. Y

16- 81411-4

6

310A

Statement of Facts To Be Used in Making and Filing My Petition for Naturalization

3

(1) My full, true, and correct name is Paul Moser (Full, true name, without abbreviations, and any other name which has been used must appear here) 458512

(2) My present place of residence is 71 Transverse Road, Garden City (City or town) Nassau, (County) N. Y. (State)

(3) My occupation is Civil Engineer (4) I am 36 years old

(5) I was born on 9 (Month) 15 (Day) 1911 in Biel (City or town) Bern (County, district, province, or state) Switzerland (Country)

36 (6) My personal description is as follows: Sex Male color white; complexion fair; color of eyes brown; color of hair brown; height 6 feet 0 inches; weight 175 pounds; visible distinctive marks none scotoma rt eye.

race white present nationality Swiss

(7) I am ..... married; the name of my wife ~~is~~ was Mary; we were married on 10 (Month) 19 (Day) 1940 (Year) at New York City (City or town) N. Y. (State or country); ~~she~~ she was born at Little Neck, Nassau, N.Y. (City or town) (County, district, province, or state) on 10 (Month) 16 (Day) 1914 (Year) entered the United States at ..... (City or town) on ..... (Month) (Day) (Year) for permanent residence in the United States and now resides at Lubec (City or town) Me (State or country) and was naturalized on ..... (Month) (Day) (Year) at ..... (City or town) (State) certificate No. ..... ; or became a citizen by birth

(8) I have (3) children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living are as follows:

Theodore Male 7/5/41 Born in New York City
Polet " 6/5/45 " " " " "
Danielle Female 5/19/47 " " " " "
All residing in Garden City, N.Y.

(9) My last place of foreign residence was Biel, Switzerland (City or town) (District, province, or state) Switzerland (Country) (10) I emigrated to the United States from Montreal Biel (City or town) Canada Ponce Point (Country)

(11) My lawful entry for permanent residence in the United States was at ~~New York~~ Ponce Point N.Y. under the name of Paul Moser on the "RS EXCAMBION" (Name of vessel or other means of conveyance) D+H RR on ~~11~~ Dec 29 (Month) 11 (Day) 1940 (Year) 1937

(12, Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
Port	Date (Month, day, year)	Vessel or Other Means of Conveyance	Port	Date (Month, day, year)	Vessel or Other Means of Conveyance
New York	4/21/46	TWA to Geneva	New York	1/10/47	Flight #61/02 Air France

3/31/48

(13) I declared my intention to become a citizen of the United States on Sept 30 (Month) (Day) 1940 (Year) in the ..... (Name of Court) Court of ..... at ..... (City or Town)

(14) I have resided continuously in the United States of America since ~~10~~ 12 (Month) 29 (Day) ~~1940~~ 1941 (Year) and continuously in the State of New York where I now live since ~~10~~ 12 (Month) 29 (Day) ~~1940~~ 1941 (Year)

(15) I have ..... heretofore made petition for naturalization No. 330801 on 3 (Month) 27 (Day) 1942 (Year) at Brooklyn, Kings N.Y. (City) (County) (State) in the U.S.District Court, and such petition was dismissed or denied by the Court for the following reasons and causes, to wit for lack of prosecution, and the cause of such dismissal or denial has since been cured or removed.

(16) I wish the naturalization court to change my name to none (Given name) (Middle name)

(17) (1st witness) Abraham Pinson (Name) Partner and manager (Occupation)
residing at 42-15 81st Street (Number and street) Elmhurst, L. I. (City or town) N.Y. (State)
I first met this witness in the United States on ..... (Month) (Day) 1938 (Year)

(18) (2d witness) Alfred Lynford (Name) lawyer attorney (Occupation)
residing at 98-120 Queens Blvd, (Number and street) Forest Hills, L.I. N.Y. (City or town) (State)
I first met this witness in the United States on ..... (Month) (Day) 1941 (Year)

I CERTIFY that the above statement of facts has been read by or to me and that the statement is true to the best of my knowledge and belief.

Paul Moser (Signature of applicant)

71 Transverse Road, Garden City, N.Y. (Address at which applicant receives mail)

DO NOT FILL IN BLANKS BELOW

Affidavit of witnesses to show residence of petitioner as follows:
United States 31+9-41
State .....
Examiner John Donnelly

10—11831-1

DO NOT FILL IN BLANKS BELOW

Corrections numbered ~~1~~ to ~~1~~ 1 in this Preliminary Form for Petition for Naturalization, N-400, were made by me or at my request.
Applicant Paul Moser
Date 3/31/48

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INSTRUCTIONS TO THE APPLICANT

Pages 1, 2, and 3 of this form must be completely filled out (preferably on the typewriter)

Immigrant Identification Cards and Alien Registration Receipt Cards.—Every alien who entered the United States for permanent residence on the basis of an immigration visa on or after July 1, 1928, and prior to August 27, 1940, should be in possession of an immigrant identification card. Every alien in the United States should be in possession of an alien registration receipt card. You need not forward either card with this application. However, you will be required to present these cards when you appear to file your petition for naturalization and to surrender them at the time you are admitted to citizenship. You should therefore carefully save your immigrant identification card and your alien registration receipt card.

Photographs.—You must send with this application three photographs of yourself taken within 30 days of the date of this application. These photographs must be 2 by 2 inches in size, and distance from top of head to point of chin should be approximately 1¼ inches, must not be pasted on a card or mounted in any other way, must be on thin paper, have a light background, and clearly show a front view of your face without hat. Each of these photographs must be signed by you on the margin and not on the face or clothing.

Date of your arrival.—If you do not know the exact date of your arrival in the United States, or the name of the vessel or port, and you cannot obtain this information by consulting your family or friends who came over with you, give the facts of your arrival as you remember them in the appropriate blank spaces on the first page of this form. Your immigrant identification card or your passport, ship's card, or baggage labels, if you have them, may help you to answer these questions.

If the date of your arrival in the United States was on or before June 29, 1906, you should submit with this application documentary evidence of your residence in the United States prior to that date. Such documents may be family bible entries, deeds of record, wills or other authentic legal documents, life insurance policies, bankbooks and records, employment records or other documents showing that you entered the United States on or before June 29, 1906. Do not submit such documents if your arrival in the United States was after June 29, 1906, or if your declaration of intention (first paper) accompanies this application.

Nationality and Race.—Nationality in statement No. 6, page 3, refers to the country of which you are a citizen or subject. As to "race" in the same statement, Section 303 of the Nationality Act of 1940 provides that only white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere are eligible for naturalization. There are certain exceptions, in the cases of native-born Filipinos who have served honorably in the United States Army, Navy, Marine Corps, or Coast Guard for a period of at least 3 years, and in the cases of women who have lost United States citizenship through marriage.

As stated above, the following races are eligible for naturalization:

White.	Indian.
African or African descent.	Eskimo.
Filipino.	Aleutian.

State to which of these classifications you belong.

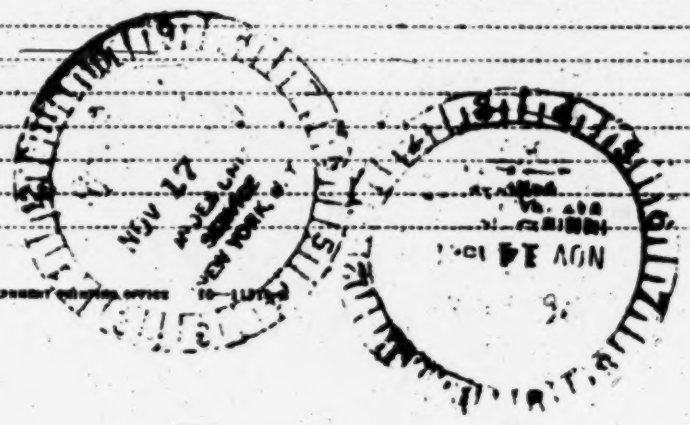
***WITNESSES.**—The names, occupations, and addresses of two citizens you expect to bring with you as witnesses when you appear for examination to file your petition should be stated in items (17) and (18) on page 3. (These witnesses must have personal knowledge of your residence in the State where you now reside and have resided for the past 6 months, and of your character and other qualifications. A foreign-born witness must bring proof of his citizenship.)*

PENALTY FOR FALSELY SWEARING IN NATURALIZATION CASES

It is a felony, punishable by a fine of not more than $5,000 or imprisonment for not more than 5 years, or both, for an alien or other person, whether an applicant for naturalization or citizenship, or otherwise, knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship. (Nationality Act of 1940, Sec. 346 (a) (d).)

RESULT OF EXAMINATION

TO THE APPLICANT—Do not write on these lines



Examiner ..

✓ Petition for Naturalization No. 458512

11

ORIGINAL
(To be retained by Clerk of Court)

UNITED STATES OF AMERICA

458512
No.

PETITION FOR NATURALIZATION

[Of a Married Person, under Sec. 310(a) or (b), 311 or 312, of the Nationality Act of 1940 (54 Stat. 1144-1145)]

To the Honorable the U.S. District Court of Eastern District at Brooklyn, N.Y.
This petition for naturalization, hereby made and filed pursuant to Section 310(a) or (b), of the Nationality Act of 1940, respectfully shows:

(1) My full, true and correct name is PAUL MOSER
(Full, true name. Without abbreviation, and any other name which has been used, must appear here)

(2) My present place of residence is 71 Transverse Rd. Garden City, Nassau NY. (3) My occupation is Civil Engineer
(Number and street) (City or town) (County) (State)

(4) I am 36 years old. (5) I was born on Sept. 15, 1911 in Biel, Bern, Switzerland
(Month) (Day) (Year) (City or town) (County, district, province, or state) (Country)

(6) My personal description is as follows: Sex Male, color white, complexion fair, color of eyes brn, color of hair brn., height 6 feet 0 inches, weight 175 pounds; visible distinctive marks scar over rt. eye; race white; present nationality Swiss

(7) I am ..... married; the name of my wife ~~[illegible]~~ is Mary; we were married on Oct. 19, 1940
(Month) (Day) (Year)

at New York, N.Y.xxx (City or town) (State or country) ~~[illegible]~~ she was born at Little Neck, Nassau.NY (City or town) (County, district, province, or state) (Country) on Oct.16,1914 (Month) (Day) (Year)

entered the United States at XXXXXXXXXXXX (City or town) (State) on — — (Month) (Day) (Year) for permanent residence in the United States, and now resides XX with me at 71 Transverse Rd. Garden City, L.I.N.Y. (Number and street) (City or town) (State or country) (Month) (Day) (Year) at — — (City or town) (State)

certificate No. — — —, or became a citizen by Birth

(7a) (If petition is filed under Section 311, Nationality Act of 1940) I have resided in the United States in marital union with my United States citizen spouse for at least 1 year immediately preceding the date of filing this petition for naturalization.

(7b) (If petition is filed under Section 312, Nationality Act of 1940) My husband or wife is a citizen of the United States, is in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General of the United States, or an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof; and such husband or wife is regularly stationed abroad in such employment. I intend in good faith to take up residence within the United States immediately upon the termination of such employment abroad.

(8) I have 3 children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows:
Theodore (M) July 5, 1941; Polet (M) June 5, 1945; Danielle (f) May 19, 1947 all three born and reside at New York

(9) My last place of foreign residence was Biel, Switzerland (City or town) (County, district, province, or state) (Country) (10) I emigrated to the United States from Montreal (City or town) Canada (Country) (11) My lawful entry for permanent residence in the United States was at Rouses Point, N.Y (City or town) (State) under the name of Paul Moser on Dec. 29, 1937 (Month) (Day) (Year) on the D.&H.R.R. (Name of vessel or other means of conveyance) as shown by the certificate of my arrival attached to this petition.

(12) Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
PORT	DATE (Month, day, year)	VESSEL OR OTHER MEANS OF CONVEYANCE	PORT	DATE (Month, day, year)	VESSEL OR OTHER MEANS OF CONVEYANCE

(13) (Declaration of intention not required) (14) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States. (15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. (16) I am able to speak the English language (unless physically unable to do so). (17) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. (18) I have resided continuously in the United States of America for the term of 3 years at least immediately preceding the date of this petition, to wit: since December 29, 1937 (Month) (Day) (Year) (19) I have xxx heretofore made petition for naturalization number 330801 on March 27, 1942 (Month) (Day) (Year) at Brooklyn, Kings New York (City or town) (County) (State) in the U.S.District (Name of court)

Court, and such petition was dismissed or denied by that Court for the following reasons and causes, to wit: lack of prosecution and the cause of such dismissal or denial has since been cured or removed.

(20) Attached hereto and made a part of this, my petition for naturalization, are a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States for permanent residence (if such certificate of arrival be required by the naturalization law), and the affidavits of at least two verifying witnesses required by law.

(21) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to .....

(22) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name. SO HELP ME GOD.

Paul Moser
(Full, true, and correct signature of petitioner. Without abbreviation)

Form N-405
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
(Edition of 1-13-41)

e16—19480

9

13

AFFIDAVIT OF WITNESSES

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Abraham Pinson my occupation is Partner & Manager

I reside at 42-15 81st St, Elmhurst, LI, NY (Number and street) (City or town) (State)

My name is Alfred Lynford my occupation is Attorney

I reside at 98-120 Queens Blvd. Forest Hills, LI, N.Y. (Number and street) (City or town) (State)

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with Paul Moser, the petitioner named in the petition for naturalization of which this affidavit is a part, since March 1, 1941 (Month) (Day) (Year) to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and I have personal knowledge that the petitioner is now and during all such period has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: SO HELP ME GOD.

Abraham Pinson (Signature of witness) Alfred Lynford (Signature of witness)

Subscribed and sworn to before me by the above-named petitioner and witnesses, in the respective forms of oath shown in said petition and affidavit, in the office of the Clerk of said Court at Brooklyn N.Y. this 31st day of March, Anno Domini 19 49 I hereby certify that Certificate of Arrival No. 2-566741 from the Immigration and Naturalization Service, showing the lawful entry for permanent residence of the petitioner above named, has been by me filed with, attached to, and made a part of this petition on this date.

Clerk.

By Charles N. Miller [SEAL]
Deputy Clerk.

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: SO HELP ME GOD. In acknowledgment whereof I have hereunto affixed my signature.

Paul Moser
(Signature of petitioner)

Sworn to in open court, this 21 day of July, 1949, A. D. 19....

Clerk.

By Joseph Negri
Deputy Clerk.

NOTE.—In renunciation of title or order of nobility, add the following to the oath of allegiance before it is signed: "I further renounce the title of (give title or titles) which I have heretofore held," or "I further renounce the order of nobility (give the order of nobility) to which I have heretofore belonged."

Petition granted: Line No. ..... of List No. ..... and Certificate No. 6849995 issued.

Petition denied: List No. .....

Petition continued from 3/10/49 to 90 days from date List 268a
June 9, 1949 Decision reserved List 281a

10

13a

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

GOVERNMENT'S FORMAL OBJECTION

The United States of America hereby opposes the granting of citizenship to the petitioner above named on the ground that he is ineligible for naturalization by virtue of Section 3(a) of the Selective Training and Service Act of 1940, as amended, having made application for relief from military service.

That in support of the objection hereby interposed, the following are offered in evidence:

1. Photostatic copy of DSS Form 301 executed by petitioner on February 26, 1944.
2. Photostatic copy of DSS Form 40 executed by petitioner on January 15, 1941.
3. Triplicate copy of Declaration of Intention #411089 dated March 9, 1938.
4. Letter from Selective Service dated April 12, 1948.

[fol. 15] 5. Form A-2214 (Preliminary Form for Petition for Naturalization) received March 27, 1942.

6. Triplicate Petition for Naturalization No. 330801 filed by petitioner in the U. S. District Court at Brooklyn, New York on March 27, 1942.

Wherefore, objection is made to the granting of the petition for naturalization as aforesaid.

Dated: June 9, 1949.

Edward J. Shaughnessy, District Director, Immigration and Naturalization Service.

[fol. 16] EXHIBIT 1

New York City Headquarters, Selective Service System

516 West 34th Street, New York 1, N. Y.

Refer to File 15:HFM

Moser, Paul, Order No. 674, Local Board No. 14,
2271-458512-RD

April 20, 1949.

U. S. Department of Justice, Immigration & Naturalization,
271 Washington Street, Brooklyn, New York.

GENTLEMEN:

Your letter of April 14, 1949 relative to the above-named is acknowledged.

Enclosed herewith are photostatic copies of DSS form 301 and registrant's letter dated January 29, 1944 whereby he sought and was accorded relief from military service in the Armed Forces of the United States.

For the New York City Director, (Signed) Ernestine F. Bullis, Chief, Records Division.

[fol. 17] Application by Alien for Relief from Military Service

Local Board No. 14 23
New York County 061
FEB 26 1944 014
331 Madison Ave., Rm. 1004
New York, N. Y.
(*Local Board Date Stamp With Code*)

February 26, 1944

STATE OF NEW YORK,
County of Queens, ss:

I, Paul Moser do solemnly swear—or—affirm—that I am a citizen or subject of Switzerland; I am a registrant of Local Board 14, New York, Man., New York; my alien reg-

istration number is 4906863; I have not declared my intention to become a citizen of the United States; my declaration of intention to become a citizen of the United States is No. ——, and was filed in the —— Court at (City): ——, (County): ——, (State): ——, on (Month and day): ——, 19—.

I hereby apply for relief from liability for training and service in the land or naval forces of the United States.

(Signature of registrant): (Signed) P. Moser.

Subscribed and sworn before me this 26th day of February, 1944. (Signed) Henry Goldfine, Comm. of Deeds, City of New York. (Signature of officer)

[fol. 18] Exhibit 1

Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provides in part "That any Citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

Instructions

This form should be executed by the registrant in duplicate. The local board will transmit the original to the Director of Selective Service through the State Director of Selective Service and will retain the duplicate in the registrant's Cover Sheet (Form 53). (See section 622.43 (b) of the Selective Service Regulations.)
DSS Form 301 (Revised 3-16-43)

[fol. 19] EXHIBIT 1-A

(Stamp of Local Board)

Date received ——, 194-.

Application by Alien for Relief from Military Service

STATE OF ——,
County of ——, ss:

I (First name): ——, (Middle name): ——, (Surname): ——, do solemnly swear—affirm—that I reside at (City): ——, (County): ——, (State): ——; that I am registered with Local Board (Number): ——, (City): ——, (County): ——, (State) ——; that my order number is —— and serial number is ——; and that I am a citizen or subject of (County): ——, which is neutral in the present war. My alien registration number is ——.

I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. [fol. 20] I have) or (have not): —— filed a declaration of intention to become a citizen of the United States.

(To be Filled in by Declarant Neutral Aliens Only)

My declaration of intention to become a citizen of the United States was filed in the —— court at (City): ——, (County): ——, (State): ——, on ——, 19— (Strike out *a* or *b*, whichever does not apply.) *a* I herewith surrender my original triplicate copy of my declaration of intention to become a citizen of the United States, number ——. *b* the original triplicate copy of my declaration of intention to become a citizen of the United States is not in my possession for the reason that ——, but I undertake to surrender said copy of my declaration of intention to become a citizen of the United States should it at any time come into my possession.

(Signature of registrant): —— ——.

Subscribed and sworn to before me this — day of ——, 194—. (Signature of Officer): —— ——.
(Designation of Officer): —— ——.

[fol. 21] (This oath may be administered by any civil officer authorized to administer oaths generally, any commissioned officer of the land or naval forces assigned for duty with the Selective Service System, any member or clerk of a local board or board of appeal, any Government appeal agent or associate Government appeal agent, any member or associate member of an advisory board for registrants, any postmaster, acting postmaster, or assistant postmaster.)

Instructions

Any citizen or subject of a neutral country who wishes to be relieved from liability for training and service under the Selective Training and Service Act of 1940 as amended prior to his induction must execute two copies of this application which shall be subscribed and sworn to, and filed with the local board.

The local board will transmit the original of the Application by Alien for Relief From Military Service (Form 301), together with the triplicate copy of the declaration of intention to become a citizen of the United States, if surrendered, to the State Director of Selective Service for transmittal to the Immigration and Naturalization Service of the Department of Justice. The remaining copy of Application by Alien for Relief From Military Service (Form 301) will be filed in the registrant's cover sheet (Form 53).

DSS Form 301.

(Here follows 1 Photolithograph, side folio 22-23)

18A

Exhibit 2 to [illegible] 411083

United States District Court
TRIPLICATE (This copy to be given to declarant)
Southern District of New York
Exhibit — to Deposition
Date June 9, 1947
[illegible]
Deputy Clerk

No. 458512

UNITED STATES OF AMERICA

DECLARATION OF INTENTION

(Invalid for all purposes seven years after the date hereof)

In the _____ Court

In re: _____

of _____ at _____

I, PAUL MOSER (Full name in which petition for naturalization will be made, and proper name which has been used, must appear here)

now residing at 306 East 86th St. New York, NY (Number and street) (City or town) (County) (State)

occupation Civil Engineer, aged 28 years, do declare on oath that my personal description is:

Sex Male, color white, complexion light, color of eyes brown

color of hair brown, height 6 feet — inches; weight 180 pounds; visible distinctive marks none

race German; nationality Swiss

I was born in Biel, Switzerland (City or town) (Country) on September 15, 1911 (Month) (Day) (Year)

I am not married. The name of my wife or husband is _____

we were married on _____ (Month) (Day) (Year), at _____ (City or town) (State or country); she or he was

born at _____ (City or town) (State or country), on _____ (Month) (Day) (Year), entered the United States

at _____ (City or town) (State), on _____ (Month) (Day) (Year), for permanent residence therein, and now

resides at _____ (City or town) (State or country) I have no children, and the name, date and place of birth,

and place of residence of each of said children are as follows: _____

I have not heretofore made a declaration of intention: Number _____, on _____ (Date)

at _____ (City or town) (State or court)

my last foreign residence was Biel, Switzerland (City or town) (Country)

I emigrated to the United States of America from (Havre, France) Montreal (City or town) Spain (Country)

my lawful entry for permanent residence in the United States was at Rouses Point, NY (City or town) (State)

under the name of Paul Moser, on December 22, 1937 (Month) (Day) (Year)

on the vessel DAIR (If other than by vessel, state manner of arrival)

I will, before being admitted to citizenship, renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which I may be at the time of admission a citizen or subject; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to reside permanently therein; and I certify that the photograph affixed to the duplicate and triplicate hereof is a likeness of me: So HELP ME GOD.

X Paul Moser.
(Complete signature of declarant, without abbreviation, and write in ink)

Subscribed and sworn to before me in the office of the Clerk of said Court, at New York, NY this 24th day of March anno Domini 19 38 Certification No. 5667A1 from the Commissioner of Immigration and Naturalization showing the lawful entry of the declarant for permanent residence on the date stated above, has been received by me. The photograph affixed to the duplicate and triplicate hereof is a likeness of the declarant.

[SEAL] Clerk of the _____ Court.

By _____, Deputy Clerk

Form 2202—I-A
16—6222
U. S. DEPARTMENT OF LABOR
IMMIGRATION AND NATURALIZATION SERVICE

11

22-23

[fol. 24] EXHIBIT 3

Consulate General of Switzerland

New York

For the States of N. Y., Northern N. J., Conn., R. I., Mass., Me., Vt., N. H, Puerto Rico and the Virgin Islands

Please Refer to No 8.21.37 FL: FT

New York, N. Y.
444 Madison Avenue
February 3, 1944

Mr. Paul Moser, 88-10 Whitney Avenue, Elmhurst, Long Island

DEAR SIR:

I refer to our recent conversation regarding your application for unconditional release from the liability for military service in the United States Armed Forces, and wish to inform you that according to information received from our Legation, they are of the opinion that you should be considered as a non-declarant Swiss alien. Your application has at once been submitted to the Department of State for further action. You should inform this office or the Legation of any communication you might receive from your Local Board.

The Military Department of our Legation states that your military taxes for 1942 and 1942 in the amount of $40.43 (including 3¢ postage) are still outstanding, and [fol. 25] they request that these arrears be liquidated immediately. Since you failed to submit a Military Tax Return for 1943, the Legation was compelled to make an official assessment. Although the tax bill for 1943 has not been received, they expect the bill to amount to $29.50. I would, therefore, appreciate your remitting to me the total amount of $69.93, as soon as possible. Furthermore, your declaration for 1944 should also be submitted.

Yours very truly, The Consul General of Switzerland. By: (signed) Charles F. Rosset Vice Consul.

[fol. 26] EXHIBIT 4

January 24, 1944

Consulate General of Switzerland, 444 Madison Avenue, New York, N. Y.

Re: Paul Moser 88-10 Whitney Avenue, Elmhurst, L. I.
Order No. 674

GENTLEMEN:

The *Local Board No. 14*, 331 Madison Avenue, New York City, has classified me on January 20, in 1-A. I wish to be reclassified and deferred from service in the armed forces of the United States as a neutral alien. My status is an "*Alien without first papers for American citizenship,*" for the following reason:

In 1937 I immigrated to the U.S.A. from Canada and shortly after I took out first papers. On May 11, 1940 I returned to Switzerland to join our Army in the field. Upon leaving this country I did not take out a reentry permit and I lost so all the rights ever to return as a resident of the U.S.A. In September 1940 I was forced to apply on the U.S. Consulate in Zuerich for a new immigration visa, and I arrived in New York, on October 11, 1940 under a new immigration quota.

On March 27, 1942 I filed in Brooklyn Court for final citizenship. After a thorough examination of my papers, the citizenship was denied for the reason that, when I left for Switzerland "without a reentry permit" I lost all rights [fol. 27] to my first papers. Two ways to obtain the citizenship were suggested to me by the chief-examiner:

1. To file again for first papers under my new immigration quota number.
2. As I married an American citizen, to await residence of two years and refile again for final papers.

I did not take any action since then.

Since the right to appeal from classification is limited to 10 days, and expires on January 30, 1944, will you kindly let me know if I have to appeal in writing myself, or if you are taking this matter up yourself.

Very truly yours, —— ——.

[fol. 28] EXHIBIT 5

Paul Moser, 88-10 Whitney Avenue, Elmhurst, L. I., N. Y.

January 25, 1944

The Legation of Switzerland, Washington, D. C.

GENTLEMEN:

In conjunction with my letter to Director, Selective Service System, Washington, D. C. kindly find the answers to your prerequisites as outlined on your directive.

a) I entered the United States with an Immigration quota visa on October 11, 1940.

b) I have matriculated with the Consulate General in New York, N. Y. on .....

c) Since my entry in 1940 I have not obtained nor application filled out for "First papers".

d) I have order No. 674.

e) Local Board No. 14, 331 Madison Avenue, New York, N. Y.

Very truly yours, Paul Moser.

23

Exhibit 6

FORM A-2824
U. S. DEPARTMENT OF LABOR
IMMIGRATION AND NATURALIZATION SERVICE

ACT OF MAY 24, 1934

APPLICATION FOR A CERTIFICATE OF ARRIVAL and PRELIMINARY FORM FOR PETITION FOR NATURALIZATION

No. 2-5661741
458512

MAR 27 1942

For use in searching records of arrival:

United States District Court
Eastern District of New York
Exhibit 12 in evidence
Date June 9, 1949
Thomas Brackett Reed
Deputy Clerk

RECORD FOUND

Card index .....
Index books .....
Manifests .....

Place .....
Name .....
Date .....
Number .....

(Signature of person making search)

Use Form 160-Im. in issuing certificate of arrival on this application.

TO THE APPLICANT: Do not write above this line. Read carefully and follow the instructions on last page hereof.

Take or mail this application and your money order to—

IMMIGRATION AND NATURALIZATION SERVICE
Federal Building, Christopher Streets
641 Washington Street
NEW YORK N. Y.

Date ....., 19

R. O. Index

I, Paul Moser, residing at 454 - 44th St. (Number and street), New York (City or town), N.Y. (State), desire to file petition for naturalization in the District (Name of court) Court at New York (City or town) N.Y. (State), in accordance with the naturalization law. I submit herewith a statement of facts to be used in filing such petition, two photographs of me, each of which I have signed, and my declaration of intention (first paper), if one is required.

See instructions on page 4 hereof, paragraph entitled "Money Order." If you are not exempted therefrom you must secure a money order in payment for a certificate of arrival and fill in the blank below:

I hereby apply for a certificate of arrival showing my lawful entry into the United States for permanent residence, and inclose money order No. ..... in the sum of $2.50 made payable to the order of the "Commissioner of Immigration and Naturalization, Washington, D.C.," in payment for the certificate of my arrival.

I arrived in the United States ~~through the port of~~ from Montreal (City or town) Rouses Point (State) N.Y., under the name of Paul Moser, on 12 (Month) 29 (Day) 1937 (Year), on the vessel Railroad D & H RR. (If otherwise than by vessel, state manner of arrival)

Additional facts to aid in locating a record of my arrival:

1. I have not used another name in this country than that given above. (If so) It was —
   I used that name because —
2. The full name of the person shown on my steamship ticket was Paul Moser
3. I was born in Bienne (City or town) Switzerland (Country) on 9 (Month) 15 (Day) 1911 (Year)
4. My father's full name is/was Theodor Moser
5. My mother's maiden name was Adeline Uhler
6. (If a married woman) My maiden name was —
7. My last foreign residence was Biel / Bienne (City or town) Switzerland
8. The place where I took the ~~ship or~~ train which landed me in the United States was Montreal (City or town) Canada (Country)
9. The ticket on which I came to this country was bought at Montreal (City) Canada (Country)
10. (If arrival by ship) Name of steamship line was —
    first, second, or third cabin — I arrived as a passenger, stowaway, seaman, member of crew, or otherwise passenger
11. I traveled on (an immigration visa, a passport, or permit to reenter) Immigration visa (State which, giving particulars)
12. My original Immigrant Identification Card No. 946810 (State which) is hereto attached. If not herewith, it is because withheld at the American Consulate in Zurich, Switzerland. Mail
13. I paid $ 8.00 head tax at Montreal (City or town) Canada (State or country) on 12 (Month) 29 (Day) 1937 (Year)
14. I was ..... examined by United States immigration officers at Rouses Point (City or town) N.Y. (State or country)
15. (If not examined, state why, and give the circumstances of your entry) —
16. The person in the United States to whom I was coming was Eleanor Davis
17. The place in the United States to which I was going was New York.
18. ~~The names of some of the passengers or other persons I traveled with and their relationship to me, if any, are~~

First Arrival in U.S.A. July 6, 1937 on Vessel Ile de France

I was previously in the United States from July 6, 37 to Dec 25, 1937

16—11311

12

29

Claims did not file county papers [illegible] applic. No 2,1710 Rec'd Claim had 4 B visa Exchanged? 3-22-42 B

I have set forth below my answer to the following questions asked of me:

19. Have you been absent from the United States since the date of your arrival as stated on page 1 of this form? Yes
If so, state month and year you left 5. 11. 1940; month and year you returned 10. 11. 1940
To what country did you go? Switzerland For what reason? Army service
Is this the only time you have been out of the United States? Yes
If not, give full particulars as to other absences —
1938 - Ca - 1 day -
1939 Ca - 4 days

20. In what places in the United States have you resided?
New York (City or town) N.Y. (State) From July (Month) 1937 (Year) to date. (Month) (Year)
(City or town) (State) From (Month) (Year) to (Month) (Year)
(City or town) (State) From (Month) (Year) to (Month) (Year)

21. What were the names and addresses of your employers during the five years immediately prior to the date of this statement?
Th. Moser (Employer's name) 1935 - 1937 (Date) Switzerland (Number and street) (City) (State)
Madigan Hyland (Employer's name) 1937-1940 (Date) 28-04 41st Ave. (Number and street) L.I. City (City) N.Y. (State)
Vulcan Steel Prod Co Nov 1940 - Date - 233 Varick St

22. Do you understand the principles of government of the United States? Yes
23. Do you fully believe in the form of government of the United States? Yes
24. Are you ready to answer questions as to the principles and form of government of the United States? Yes
What have you done to prepare yourself for an examination on the government of the United States?
I read books of U.S. history.

25. Have you read the following oath of allegiance? Yes

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I was before a citizen or subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign or domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God.

Are you willing to take this oath in becoming a citizen? Yes
Of what country are you now a citizen or subject? Switzerland.
26. If necessary, are you willing to take up arms in defense of this country? Yes
Did you claim exemption from the draft during the World War because you were an alien? No) - not here.
Did you surrender your declaration (first paper) at that time? — No
27. If not now married, have you ever been married? — Are you divorced? No
Are you a believer in the practice of polygamy? No
28. Are you a believer in anarchy? No Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? No Baerer Club
29. Have you ever been an inmate of an insane asylum? No Swiss Soc.
30. Have you ever been arrested or charged with violation of any law or ordinance, except minor traffic regulation? Yes If so, give full particulars passing Red light Queens N.Y.
2-27-42 B 4-1-40 Fd. 5 —
31. (a) In what place in the United States did you meet for the first time your first witness named on the opposite page? New York (City or town) N.Y.
How often have you seen this witness each month since the date you first met him (her)? every day
At what places? City.
(b) In what place in the United States did you meet for the first time your second witness named on the opposite page? New York (City or town) N.Y.
How often have you seen this witness each month since the date you first met him (her)? every day
At what places? Business
32. Have you ever been deported from the United States, or are deportation proceedings now pending against you? No
If so, state all facts —
33. Was your father or mother ever a citizen of the United States? No If so, give full particulars —
34. Did you yourself fill out this form? Yes If not, who filled out this form for you? —

I certify that all the statements made by me in this application and form are true to the best of my knowledge and belief.

Dec 1941 - Pd 1 - Queens Traffic Ct.
Arrest Wrong 1940 -

Paul Moser (Signature of applicant)
451 E 32 - 35 High St. N.Y.N.Y. (Address of each applicant receive mail)
after Jan 13th 1941 - 43-05 - 36th St. L.I. N.Y. 13

No. 1523890

25

Ex. 7
DENIED

330801-D

Form N-400
U. S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
(Rev. 1-1-46)

Form Approved
BUDGET BUREAU No. 43-R079.42

No. .....

Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization

For use in searching records of arrival:

RECORDS EXAMINED

Card index .....
Index books .....
Manifests .....
.....
.....

Use Form N-215 or N-230 in issuing certificate of arrival on this application.

RECORD FOUND

Place United States District Court
Name Eastern District of New York
Exhibit 7 in evidence
Date June 9, 1949
Manner .....
Marital status .....
Thomas Murphy
Deputy Clerk

TO THE APPLICANT: DO NOT WRITE ABOVE THIS LINE. READ CAREFULLY AND FOLLOW THE INSTRUCTIONS ON LAST PAGE HEREOF.

Take or mail this application to:
IMMIGRATION AND NATURALIZATION SERVICE,
[redacted]
70 COLUMBUS AVENUE,
NEW YORK, 23, N. Y.

Date November 10, 19 47

I, Paul Moser (Name of applicant) residing at 71 Transverse Road (Number and street)
Garden City (City or town) Nassau (County) New York (State), desire to file a petition for naturalization in the ..... (Name of court) Court at ..... (City or town) (State) I submit herewith a statement of facts to be used in filing such petition, three photographs of myself, each of which I have signed, and my declaration of intention (first paper), if one is required

I hereby apply for a Certificate of Arrival (if required) showing my lawful entry into the United States for permanent residence. NOTE.—IF THIS APPLICATION IS ACCOMPANIED BY A DECLARATION OF INTENTION (FIRST PAPER) MADE SINCE JULY 1, 1929, ANSWER ONLY QUESTION NUMBER 5 ON THIS PAGE.

(1) I arrived in the United States through the port of New York (City or town) New York (State) on 11 (Month) 10 (Day) 1940 (Year)
under the name of Paul Moser
on the vessel SS "Excambion"
(If arrival was through {Canada / Mexico} I arrived at the port of ..... (If otherwise than by vessel, show manner of arrival) on ..... (Month) ..... (Day) on the vessel .....)

(2) (If arrival by ship) Name of steamship line was American Export Lines, Inc.
first, second, or third cabin Second (State which) I arrived as a passenger, stowaway, seaman, member of crew, or otherwise passenger

(3) The ticket on which I came to this country was bought at Biel (City) (State which, giving particulars) Switzerland (Country)

(4) The steamship ticket on which I traveled was in the name of Paul Moser

(5) I have ..... been absent from the United States as follows: 11/26/45 to 12/29/45 N.Y.P.AA. Flight #NC88884
4/21/46 to 1/10/47 . N.Y.-AirFrance Flight #61/02
7/27/47 to 7/31/47 Ogdensburg, N.Y.a Car.
(Dates of departure and return, ports of entry, and names of vessels or other means)
I have not been absent at any other time.

(6) I was born in Biel (City or town) Switzerland (Country) on 9 (Month) 15 (Day) 1911 (Year)

(7) My father's full name is/was Theodore Moser

(8) My mother's maiden name was Adaline Uhler

(9) (If a married woman) My maiden name was .....

(10) My last foreign residence was Biel Switzerland

(11) The place where I took the ship or train which landed me in the United States was Lisbon (City or town) Portugal (Country)

(12) I traveled on (an immigration visa, a passport, or permit to reenter) Immigration Visa (State which)

(13) I was ..... examined by United States immigration officers at Port of New York, N.Y. (City or town) (State or country)

(14) (If not examined, state why, and give the circumstances of your entry) .....

(15) The person in the United States to whom I was coming was Miss Mary Daniel
New York, N. Y.

(16) The place in the United States to which I was going was .....

(17) The names of some of the passengers or other persons I traveled with, including members of my own family and their relationship to me, if any, are none

16 -11811 4

[OVER]

14

30

(18) In what places in the United States have you resided during the past five years?

New York, N.Y. From Oct. 1942 to date
(City or town) (State) (Month) (Year) (Month) (Year)

From ____ to ____

From ____ to ____

(19) What were the names, occupations, and addresses of your employers during the last 5 years?

Vulcan Steel Product Co. 232 Varet St., Brooklyn, NY, 1940 - 1941, Engineer
(Employer's name) (Occupation) (Number and street) (City) (State) (Type of employment)

Queens Model Engineering Co., 102-02 Corona Ave., Corona, NY, 1942-1945, Manager

Mareg Inc. 24-16 Bridge Plaza So., LIC, NY, 1946-1947, Manager
(Employer's name) (Occupation) (Number and street) (City) (State) (Dates of employment)

(20) Have you read the following oath of allegiance? yes

"I HEREBY declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God."

Are you willing to take this oath in becoming a citizen? yes

Of what country are you now a citizen or subject? Switserland

(21) If necessary, are you willing to take up arms in defense of the United States? yes

Have you ever, during the time this country was at war, deserted the military or naval forces of the United States, or departed from the jurisdiction of the enrollment district or the United States to avoid draft into the military or naval forces of the United States? no

(22) How many times have you ever been married? once

(23) Have you ever been an inmate of an insane asylum? no

(24) Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation? yes

If so, give date, place and cause of arrest and disposition of each case

6/13/47 Speed. fined. Traffic Court of Queens.

(25) Have you ever been deported from the United States, or are deportation proceedings now pending against you? no

If so, state all facts

(26) During the last ten (10) years I have been a member of the following organizations and no other

Chamber of Commerce of Queens

(27) Was your father or mother ever a citizen of the United States? no If so, give full particulars

(28) Did you register under the Alien Registration Act of 1940? yes

If so, state the number of your Alien Registration Receipt Card 4906863

(29) If male, did you register under the Selective Service (Draft) Law of 1940 as amended? yes
(Registration number)

If so state your Draft Board No. 14 Located at New York N.Y. N.Y.
(City) (County) (State)

Classified in class 1A, 4A Reason for such classification

(30) Did you yourself fill out this form? yes If not, give the name and address of the person who did

(31) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States. I am not, and have not been for the period of at least 10 years immediately preceding the date of this statement, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. I am able to speak the English language, unless physically unable to do so. I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

I CERTIFY that all the statements made by me in this application and form are true to the best of my knowledge and belief.

(Signature of applicant)

71 Transverse Road
(Number and street)

Garden City, N.Y.
(City) (State)

16—11911-8

15

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Statement of Facts To Be Used in Making and Filing My Petition for Naturalization

(1) My full, true, and correct name is Paul Moser
(Full true name, without abbreviation, and any other name which has been used since birth)

(2) My present place of residence is 71 Transverse Road, Garden City, Nassau, New York
(Number and street) (City or town) (County)

(3) My occupation is Civil Engineer (4) I am 35 years old

(5) I was born on 9 15 1911 in Biel Bern Switzerland
(Month) (Day) (Year) (City or town) (County, district, province, or state) (Country)

(6) My personal description is as follows: Sex male; color white; complexion fair; color of eyes brown; color of hair brown; height 6 feet 0 inches; weight 175 pounds; visible distinctive marks none; race white; present nationality Swiss

(7) I am ..... married; the name of my wife or husband is Mary
we were married on 10 19 1940 at New York N.Y.
(Month) (Day) (Year) (City or town) (State or country)
he or she was born at Little Neck, Nassau, N.Y. on 10 16 1914
(City or town) (County, district, province, or state) (Country) (Month) (Day) (Year)
entered the United States at (City or town) (State) on (Month) (Day) (Year) for permanent residence in the United States and now resides at (City or town) (State or country) and was naturalized on (Month) (Day) (Year) at (City or town) (State) certificate No. ; or became a citizen by birth

(8) I have 3 children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living are as follows:
Theodore, male, 7/5/41 Born in NYC
Polet " 6/5/45 " " "
Danielle, Female 5/19/47 " " "
All reside in Garden City, N.Y.

(9) My last place of foreign residence was Biel, Switzerland (City or town) (County, district, province, or state) (Country) (10) I emigrated to the United States from Biel (City or town) Switzerland (Country)

(11) My lawful entry for permanent residence in the United States was at New York (City or town) N.Y. under the name of Paul Moser on 10 17 1940 (Month) (Day) (Year) on the "SS Excambion" (Name of vessel or other means of conveyance)

(12) Since my lawful entry for permanent residence I have ..... been absent from the United States, for a period or periods of 6 months or longer, as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES		
Port	Date (Month, day, year)	Vessel or Other Means of Conveyance	Port	Date (Month, day, year)	Vessel or Other Means of Conveyance
New York	4/21/46	TWA to Geneva	New York	1/10/47	Flight #61/02 AirFrance

(13) I declared my intention to become a citizen of the United States on ..... (Month) (Day) (Year) in the ..... Court of ..... at (City or Town) (State) 10 11 1940

(14) I have resided continuously in the United States of America since ..... and continuously in the State of New York where I now live since 10 11 1940
(Month) (Day) (Year)

(15) I have ..... heretofore made petition for naturalization No. 330801 on 3 27 1942
(Month) (Day) (Year)
at Brooklyn, New York (City or town) (County) (State) in the United States District Court, and such petition was dismissed or denied by that court for the following reasons and causes, to wit: lack of prosecution, and the cause of such dismissal or denial has since been cured or removed.

(16) I wish the naturalization court to change my name to .....

(17) (1st witness) Abraham Pinson Partner and manager
residing at 42-15 81 Street, Elmhurst, LI, NY
(Number and street) (City or town) (State)
I first met this witness in the United States on .....

(18) (2d witness) Alfred Lynford lawyer
residing at 98-12 Queens Blvd., Forest Hills, LI, NY
(Number and street) (City or town) (State)
I first met this witness in the United States on 1941
(Month) (Day) (Year)

I CERTIFY that the above statement of facts has been read by or to me and that the statement is true to the best of my knowledge and belief.

(Signature of applicant) 71 Transverse Road, Garden City, LI, NY (Address at which applicant can receive mail)

DO NOT FILL IN BLANKS BELOW

Affidavit of witnesses to show residence of petitioner as follows:

United States .....

State .....

Examiner .....

DO NOT FILL IN BLANKS BELOW

Corrections numbered ..... to ..... in this Preliminary Form for Petition for Naturalization, N-400, were made by me or at my request.

Applicant .....

Date .....

10-11311-1

16

INSTRUCTIONS TO THE APPLICANT

Pages 1, 2, and 3 of this form must be completely filled out (preferably on the typewriter).

Immigrant Identification Cards and Alien Registration Receipt Cards.—Every alien who entered the United States for permanent residence on the basis of an immigration visa on or after July 1, 1928, and prior to August 27, 1940, should be in possession of an immigrant identification card. Every alien in the United States should be in possession of an alien registration receipt card. You need not forward either card with this application. However, you will be required to present these cards when you appear to file your petition for naturalization and to surrender them at the time you are admitted to citizenship. You should therefore carefully save your immigrant identification card and your alien registration receipt card.

Photographs.—You must send with this application three photographs of yourself taken within 30 days of the date of this application. These photographs must be 2 by 2 inches in size, and distance from top of head to point of chin should be approximately 1¼ inches, must not be pasted on a card or mounted in any other way, must be on thin paper, have a light background, and clearly show a front view of your face without hat. Each of these photographs must be signed by you on the margin and not on the face or clothing.

Date of your arrival.—If you do not know the exact date of your arrival in the United States, or the name of the vessel or port, and you cannot obtain this information by consulting your family or friends who came over with you, give the facts of your arrival as you remember them in the appropriate blank spaces on the first page of this form. Your immigrant identification card or your passport, ship's card, or baggage labels, if you have them, may help you to answer these questions.

If the date of your arrival in the United States was on or before June 29, 1906, you should submit with this application documentary evidence of your residence in the United States prior to that date. Such documents may be family bible entries, deeds of record, wills or other authentic legal documents, life insurance policies, bankbooks and records, employment records or other documents showing that you entered the United States on or before June 29, 1906. Do not submit such documents if your arrival in the United States was after June 29, 1906, or if your declaration of intention (first paper) accompanies this application.

Nationality and Race.—Nationality in statement No. 6, page 3, refers to the country of which you are a citizen or subject. As to "race" in the same statement, Section 303 of the Nationality Act of 1940 provides that only white persons, persons of African nativity or descent, and descendants of races indigenous to the Western Hemisphere are eligible for naturalization. There are certain exceptions, in the cases of native-born Filipinos who have served honorably in the United States Army, Navy, Marine Corps, or Coast Guard for a period of at least 3 years, and in the cases of women who have lost United States citizenship through marriage.

As stated above, the following races are eligible for naturalization:

White.	Indian.
African or African descent.	Eskimo.
Filipino.	Aleutian.

State to which of these classifications you belong.

***WITNESSES.**—The names, occupations, and addresses of two citizens you expect to bring with you as witnesses when you appear for examination to file your petition should be stated in items (17) and (18) on page 3. (These witnesses must have personal knowledge of your residence in the State where you now reside and have resided for the past 6 months, and of your character and other qualifications. A foreign-born witness must bring proof of his citizenship.)*

PENALTY FOR FALSELY SWEARING IN NATURALIZATION CASES

It is a felony, punishable by a fine of not more than $5,000 or imprisonment for not more than 5 years, or both, for an alien or other person, whether an applicant for naturalization or citizenship, or otherwise, knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship. (Nationality Act of 1940, Sec. 346 (a) (d).)

RESULT OF EXAMINATION

TO THE APPLICANT—*Do not* write on these lines

U. S. GOVERNMENT PRINTING OFFICE 16—11311-2

Examiner .....

[fol. 34]

EXHIBIT 8

National Headquarters
Selective Service System
21st and C Street N. W.
Washington, D. C. (25)

In replying address The Director of Selective Service and Refer to No. 11.2.12-271

February 12, 1944

Director of Selective Service for New York City, 1 East 44th Street, New York, New York

Subject: Paul Moser, Local Board No. 14, New York, New York

DEAR COLONEL MCDERMOTT:

The above-named registrant claims exemption from service in our armed forces under the terms of a treaty between the United States and Switzerland of which latter country he states he is a national. As a neutral alien he is entitled to file Form 301 (Application by Alien for Relief from Military Service).

He may obtain an old Form 301 (16-26414-1) from the local board, or he may obtain a revised form 301 [fol. 35] (16-33666-1) from the Legation of Switzerland for execution and filing by him with the local board.

Until the supply on hand is exhausted the old Forms 301 may be used by the local boards in accordance with section 622.43 of the Regulations. However, if a special request is made by a registrant for a revised Form 301, he may secure it by application either to his Embassy or Legation or the National Headquarters through his local board.

For the Director (signed) Harold M. Hayes, Captain, AUS, Alien Section, Manpower Division.

4—301

[fol. 36] EXHIBIT 9

Paul Moser, Order No. 674, 88-10 Whitney Avenue, Elmhurst, L. I., N. Y.

January 29, 1944

Local Board No. 14, 331 Madison Avenue, New York, N. Y.

GENTLEMEN:

This is to inform you that I have taken the necessary steps with the Legation of Switzerland in Washington, D. C., to be released unconditionally from the liability for military service under the provisions of Article II of the treaty of Friendship, Commerce and Extradition, concluded between the United States of America and Switzerland on November 25, 1850.

I shall in due time execute before your Local Board "Form 301 as amended".

Very truly yours, (Signed) Paul Moser.

[fol. 37] EXHIBIT 10

Legation of Switzerland
Washington, D. C.

February 18, 1944

Mr. Paul Moser, 88-10 Whitney Ave., Elmhurst, L. I., N. Y.

DEAR SIR:

Please be advised that, in accordance with the provisions of Art. II, of the Treaty of Friendship, Commerce and Extradition, concluded between the United States and Switzerland on November 25, 1850, this Legation has requested the Department of State on January 27, 1944 to exempt you from the liability for personal military service with the U. S. Armed Forces.

We are forwarding to you, herewith, two copies of DSS Form 301, *revised*, which kindly execute and file immediately with your Local Board. This action on your part is necessary in order to complete the exemption procedure; your Local Board, in accordance with Selective Service regulations, as amended, will then classify you in Class IV-C.

Please note that, through filing of DSS Form 301, revised, you will not waive your right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts.

Yours very truly, Legation of Switzerland. By ——, (signed) F.

[fol. 38] The Minister of Switzerland presents his compliments to the Honorable the Secretary of State and with further reference to the Secretary's note of July 6, 1942, concerning the liability of Swiss nationals for military service in the United States, has the honor to submit the following additional case of a non-declarant Swiss citizen for unconditional release from the liability for military service, in conformity with Article II of the Treaty of Friendship, Commerce and Extradition of November 25, 1850:

Paul Moser

Address: 88-10 Whitney Avenue, Elmhurst, L. I., N. Y.

Order number: 674

Local Board No. 14, 331 Madison Avenue, Room 1004, New York City

The required letter of the above registrant to the Director, Selective Service System, in which he requests to be unconditionally relieved of the liability for military service under the provisions of Article II of the Treaty of 1850, is herewith enclosed.

Department of State
Washington.

—2—

The Minister would appreciate being informed of the final disposition of this case.

1 Enclosure.

Washington, D. C., January 27, 1944.

[fol. 39] Feb. 8, 1944.

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and has the honor

to acknowledge the receipt of his note of January 27, 1944 requesting the exemption from military service of Paul Moser, a non-declarant Swiss national.

The case has been referred to the appropriate agency of the Government for investigation and upon the receipt of a report thereon the Secretary of State will communicate with the Minister.

Department of State, Washington, February 4, 1944.
811.2222 (1940) Moser, Paul.

[fol. 40] EXHIBIT 11

New York Headquarters
Selective Service System
516 West 34th Street
New York 1, N. Y.

Refer to File 15:HFM
Moser, Paul
Order No. 674
Local Board No. 14
2271-458512

May 13, 1949.

U. S. Department of Justice, Immigration & Naturalization,
271 Washington Street, Brooklyn, New York.

Att: Mr. Harry Addelson

DEAR MR. ADDELSON:

In accordance with your request of May 11, 1949 enclosed herewith is photostatic copy of DSS Form 40—Questionnaire in the case of the above-named registrant.

For the New York City Director (Signed) Ernestine F. Bullis, Chief, Records Division.

Enclosure.

[fol. 41] Selective Service Questionnaire

Order No. 674 Date of mailing 1/9/41

Local Board No. 14
Public School No. 73
209 E. 46th St.,
New York, N. Y.
(Stamp of Local Board)

Name: Paul Moser
Address 451 East 119 St.
N. Y. C.— N. Y.

Notice to Registrant

You are required by the Selective Training and Service Act of 1940 to fill out this Questionnaire truthfully and to return it to this Local Board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

This Questionnaire must be returned on or before 1/15/41.

(Signed) Sidney Rossman, Member of Local Board.

(The above items are to be filled in by the Local Board before the Questionnaire is mailed to the registrant.)

Instructions

This Questionnaire is intended to furnish the Local Board with information to enable it to classify you in one of the following Selective Service classes:

[fol. 42] Class I includes men who are available for induction into the armed forces of the United States.

Class II includes those whose induction is deferred because of the importance to the Nation of the service they are rendering in their civilian activities.

Class III includes those whose induction is deferred because they have persons dependent upon them for support.

Class IV includes those whose induction is deferred by law and those unfit for military service.

You will receive notice from your Local Board of your classification.

Oaths required in the Questionnaire may be administered by (1) a member or chief clerk of a Local Board or Board of Appeal, member or associate member of an Advisory Board

for Registrants, or a Government Appeal Agent; (2) any Postmaster, Notary Public, or any Federal, State, county, or municipal officer authorized by law to administer oaths generally or for military purposes. No fee should be charged for this service.

Advisory Boards for Registrants are organized to assist registrants in completing their Questionnaires. No charge will be made for this service. If there is no Advisory Board available, you must nevertheless complete your Questionnaire.

If the registrant is an inmate of an institution and is unable to complete the Questionnaire, the executive head of the institution shall communicate these facts immediately to the Local Board.

[fol. 43] 1. Make no alterations in the printed matter in this Questionnaire.

2. Write the applicable words in the spaces provided in the Questionnaire.

3. If you furnish additional information or affidavits with your Questionnaire, attach the same securely to it.

4. If you are already in the active military or naval service, obtain a certificate to that effect from your commanding officer and attach same to your Questionnaire.

5. After this Questionnaire has been returned, report to your Local Board at once any change of address or any new fact which may affect your classification.

When a notice affecting you is posted at the office of your Local Board, you are bound to perform the duty required even if no notice reaches you by mail.

Any statements in this Questionnaire marked (Confidential) are for information only of the officials duly authorized under the regulations to examine them.

D. S. S. Form 40.

[fol. 44] (1)

Statements of the Registrant

Series I.—Identification

Instructions.—Every registrant shall fill in all statements in this series.

1. My name is (print) Paul — Moser.

2. In addition to the name given above, I have also been known by the name or names of ——

3. My residence is 32-55 81st Street, Jackson Heights, Queens, New York.
4. My telephone number is N. Y. Illinois 8-1962.
5. My Social Security number is 125-05-1058.

Series II.—Physical Condition (Confidential)

Instructions.—Every registrant shall fill in all statements in this series.

1. To the best of my knowledge, I have no physical or mental defects or diseases.
2. I am not an inmate of an institution.

[fol. 45] Series III.—Education

Instructions.—Every registrant shall fill in all statements in this series.

1. I have completed 5 years of elementary school and 4 years of high school.
2. I have had the following schooling other than elementary and high school:

Name of Vocational School, College or University	Course of Study	Length of Time Attended
Engineering Uni. in Switzerland	Engineering	3 years
" " " Germany	Concrete & Steel	2 years

Series IV.—Occupation or Activity

Instructions.—All registrants shall fill in statement No. 1 in this series. Every registrant who is now working shall fill in all statements in this series except No. 9. Every registrant who is now prevented from working merely because of some seasonal or temporary interruption shall fill in all statements except statements numbered 2 through 8 in this series.

As used in this series, words such as occupation, work, and job apply to services rendered in any endeavor and to training or preparation for any endeavor,

1. I am working at present.
2. The job I am working at now is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney,

[fol. 46] physics teacher, medical student, policeman, marriage license clerk, etc.):

Construction Superint.

3. I do the following work in my present job (be specific—give a brief statement of your duties):

Supervising, organizing & execution of Constr. work.

4. I have done this kind of work for 3 months. (present job).

5. My average weekly earnings in this job are $45. (Confidential.)

6. In this job I am an employee, working for salary, wages, commission, or other compensation.

7. My employer is: Vulcan Steel Products Co., 232 Varet Str., Brooklyn, N. Y.; whose business is Steel & constr. work.

8. Other business or work in which I am now engaged is ——.

(2)

9. If you are not now working because of some seasonal or temporary interruption, attach to this page a statement (a) explaining what the interruption is, when it began, and when you expect to be able to resume your work, and (b) [fol. 47] supplying substantially the same information regarding your last job as is required in the above items in this series.

10. I am licensed in a trade or profession; if so, I am licensed as Civil Engineer.

11. I am not at present an apprentice under a written or oral agreement with my employer.

12. Other facts which I consider necessary to present fairly the occupation which I have described, or my connection with it, as a ground for classification are (if none, write "None"):

Instructions.—You may attach to this page any statement from your employer whihc you think the Local Board should consider in determining your classification. Such statement will then become a part of this Questionnaire.

Series V.—Other Occupational Experience

Instructions.—Every registrant shall fill in this statement from your employer which you think the Local Board

1. I have also worked at the following occupations other than my present job, during the last 5 years:

Occupation (Give full title; for example, turret-lathe operator, farmer, etc.)	Kind of Work Done (Be specific—give a brief statement of your duties)	Years Worked From—	To—
Civil Eng. & Draftsman	Estimating & Drafting on Public Works	1937	1940

[fol. 48] Series VII.—Dependency (Confidential except as to names and addresses of claimed dependents.)

Instructions.—Every registrant shall fill in the statements numbered 1, 2, and 3 in this series.

1. (*a*) I am married.
   (*b*) I married my present wife at New York City on October 19, 1940.
   (*c*) I do live with her. If not, her address is ——

2. I have no children who are under 18 years of age or are physically or mentally handicapped, and who live with me.

3. The following persons live with me in a home maintained by me and are entirely or partly dependent on my earnings from my work in my business, occupation, or employment, and have no other sources of income except as stated below:

Name: Unborn child. Mary Moser: Sex: F. Age at last birthday: 26. Relationship to registrant: Wife. Date when support began. 10.19.40. Dependent's income, last 12 months other than board and lodging provided by the [fol. 49] registrant in his home: Contributed by the registrant: 3 months—$210. Earned by the dependent: 12 months—$900. Received from other sources: None.

8. The income I earned from my work in my business, occupation, or employment during the past 12 months was $2,100 (approx.).

10. The following is a list of all property owned by (or held in trust for) either me or my dependents, the value of

such property, and the net income received by either me or my dependents from such property during the past 12 months: (List this information separately as to the registrant and each dependent. Do not include clothing, personal effects, or household furnishings: or cash less than $500. Indicate which of such property is your home.): None.

11. I do rent the house in which I live. The monthly rent is $42, and the name and address of my landlord is M. Groskin, 11 W. 42nd St., N. Y. C.

12. Other facts which I consider necessary to present fairly my own status and that of my dependents as a basis for my proper classification are: My wife is going to stop working end of January, 1941.

Series IX.—Citizenship

Instructions.—Every registrant shall fill in the statements numbered 1, 2, 3, and 4 in this series.

[fol. 50] 1. I was born at: Nidau (town), Bern (State), Switzerland (country).

2. I was born on: September 15, 1911.

3. My race is: White.

4. I am not a citizen of the United States.

Instructions.—Every registrant who is not a citizen of the United States shall fill in the statements numbered 5, 6, 7, 8, and 9.

5. I am a citizen or subject of Switzerland.

6. My permanent residence has been in the United States since July 7, 1937.

7. I have filed a declaration of intention to become a citizen of the United States (first papers). Declaration filed at New York on March 1938 under No. —?

8. I have file a petition for naturalization (second papers). Petition filed at New York on October 1940. File No. 2-566741.

9. I have registered with the Alien Registration Division, United States Department of Justice, under the Alien Registration Act of 1940. Registration receipt card number, if received: None.

Registrant's Statement Regarding Classification

Instructions.—It is optional with registrant whether or not he fills in this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, [fol. 51] which should be taken fully into consideration regardless of whether or not this statement is filled in.

In view of the facts set forth in this Questionnaire it is my opinion that my classification should be Class III or IV.

The registrant may write in the space below or attach to this page any statement which he believes should be brought to the attention of the Local Board in determining his classification.

1. Expecting a child.
2. Citizen of Switzerland.
3. Approx. 2 years in the armed forces of Switzerland 1st Lieut. Engineers.

Registrant's Affidavit

Instructions.—1. Every registrant shall make the registrant's affidavit. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the officer who administers the oath.

State of New York,
County of Queens, ss:

I, Paul Moser, do solemnly swear (or affirm) that I am the registrant named and described in the foregoing statements in this Questionnaire, that I have read (or have had read to me) the statements made by and about me, and that [fol. 52] each and every such statement is true and complete to the best of my knowledge, information and belief.

(Signed) Paul Moser (Signature of registrant).

Subscribed and sworn to before me this 15 day of January, 1941. (Signed) Frederic C. Bellinger (Signature of officer). Associate Member of Advisory Board, Local 14 (Designation of officer).

If the registrant has received assistance from an advisor, the latter will sign the following statement:

I have assisted the registrant herein named in the preparation of this Questionnaire.

(Signed) F. C. Bellinger, Advisor.

Minute of Action by Local Board

The Local Board classifies the registrant in Class 3, Subdivision A, by the following vote: Ayes 3, Noes—. Date: 3/4/41.

(Signed) Sidney Rossman, Member.

[fol. 53] Minutes of Other Actions

3/26/40	Continued 3A (3)—BE
12/27/43	1A subject (3)—BE
1/11/44	Reclassified to 1-A—BE
1/20/44	After hearing in which registrant stated he wanted to appeal his classification, classification continued in 1A (3)—(illegible)
2/28/44	Reclassified 4C (3)—BE
10/9/45	Reclassified 4A—BE
10/15/45	DSS form 57 mailed

[fol. 54] Exhibit 12

New York City Headquarters, Office of Selective Service Records,

516 West 34th Street, New York 1, N. Y.

Refer to File No. TJH

April 12, 1948.

U. S. Department of Justice, Immigration and Naturalization Service, 271 Washington Street, Brooklyn 1, New York.

Subject: Moser, Paul, Order No. 674, Local Board No. 14

Refer to: 2271-458512 C, Brooklyn Unit

Gentlemen:

Receipt of your letter containing authorization of the above-named registrant for release of information from his file is herewith acknowledged.

In response to your request, we list herewith in chronological order classifications and reasons therefor received by this registrant:

March 4, 1941—Class III-A—based on dependency
January 11, 1944—Class I-A—available for service
February 28, 1944—Class IV-C—alien, based on Form 301 filed by him, copy of which is enclosed.
[fol. 55] October 9, 1945—Class IV-A—overage for any military service.

Very truly yours, (Signed) Candler Cobb, New York Director.

Enclosure: 1.
Certified copy of DSS Form 301

[fol. 56] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Petition No. 458512

In the Matter of the Petition of Paul Moser, to be admitted to become a citizen of the United States of America

TRANSCRIPT OF PROCEEDINGS

Brooklyn, New York.
March 10, 1949.

Before Honorable Harold M. Kennedy, U. S. D. J.

Appearances:

Morris E. Vogel, Esq., Attorney for Petitioner.
Mr. Harry Addelson, Examiner for the United States Immigration and Naturalization Service.

Mr. Addelson: The record discloses that on February 26, 1944, the petitioner, a native and national of Switzerland, [fol. 57] filed DSS Form 301 with his local Draft Board applying for relief from training and service in the land or naval forces of the United States under the Selective Training and Service Act of 1940, as amended. Section 3(a) of this Act provides that a national of a neutral coun-

try who applies for relief from training and service should thereafter be barred from becoming a citizen of the United States. Inasmuch as the petitioner, while a citizen of a neutral country, applied for relief from training and service in the armed forces of the United States, he is barred from naturalization on a decision recently rendered to which your Honor has referred.

The recommendation is for a denial.

The Court: What alternative have I?

Mr. Vogel: If your Honor please, I have prepared a memorandum but I shall also set out orally the fact that this petitioner is a native and citizen of Switzerland, that exemption was obtained for him through the Swiss Legation after negotiations between the Swiss Legation, and our State Department. As a direct result of negotiations between the two countries DSS Form 301 was expressly modified, and the express waiver by the petitioner was delimited and removed—

The Court: You mean deleted?

Mr. Vogel: That is right, it was deleted, and they prepared a revised form which they delivered to the Swiss Legation for submission to the various Swiss nationals who wanted to take advantage of a treaty existing between the two countries.

Now, this treaty, Article II of the Convention of Friendship and Commerce, was executed in November, 1850, and has existed throughout all these years. By express pro- [fol. 58] vision of said Article II a citizen of either country residing in the other was free from personal military service in the other country. I therefore maintain that the execution of this DSS Form 301 was in reality a nullity, because he did not secure the exemption by virtue of that form but rather under the treaty. As a matter of fact, the application to the Draft Board was in that vein. And I point out to your Honor that the Swiss Legation notified Mr. Moser that they had made application in his behalf, and instructed him to execute the revised Form DSS 301 as distinguished from the old form in order to reserve to himself the right to apply for naturalization, and leave it to the Court to determine the effect of the treaty on the Selective Service Act.

The Court: He signed a revised form, did he?

Mr. Vogel: He did.

The Court: What have you to say about that?

Mr. Addelson: This is the first I knew about any of this.

Mr. Vogel: Here it is (producing paper).

Mr. Addelson: This is a form I got from the Draft Board, which is just the same as any other form.

Mr. Vogel: If your Honor will look at my memorandum of law, you will find that the old form contained in the body a direct statement that "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States." That was deleted from the revised form.

The Court: Do you see it?

Mr. Addelson: It has the same thing down here.

The Court: It is under his signature. It is not a waiver, it is just a notice.

[fol. 59] Mr. Vogel: He had already been advised that this did not apply to him.

The Court: He tells the Draft Board and they certainly have been warned, he notified them that he did not waive his right to citizenship under 301. And so we get to a question of law whether the Selective Service Law overrides the treaty, or the treaty not having been abrogated can exist side by side with 301.

Mr. Addelson: It seems to me to be a personal matter between the petitioner and the United States Government. I do not see why we should hark back to a treaty with Switzerland in this case or in any other case.

The Court: In this case the petitioner was an officer in the Swiss army, and when he was asked to register under the Selective Service Law he asked for and secured that advice from the local Swiss Consulate, who then by appropriate correspondence with Colonel McDermott told him that this man was not renouncing any rights to future citizenship by his claim of relief from military service, because his claim for relief from military service was by virtue of a treaty. He then subscribed to Form 301, which was amended so that he did not waive or renounce his right to become a citizen, and he comes to this court claiming that relief.

Therefore if present recommendation for denial is based on the supposition that his application is based on 301, that supposition is ill-grounded.

Mr. Addelson: I would like to have this case continued.

The Court: I think it should be.

Mr. Addelson: Because I would look into this further myself, because this is an entire surprise to me.

[fol. 60] The Court: For your purposes the record should contain the following:

That at the first hearing the petitioner offered in evidence a revised form of application by an alien dated February 28, 1944. In conjunction with that he displayed to the Court and offered in evidence a letter signed by him and addressed to local Board 14, 331 Madison Avenue, a letter dated January 29, 1944, in which he expressly stated that his application for relief from service was based on a treaty between Switzerland and the United States executed on November 25, 1850, and still in force. He also showed a letter from the Swiss Legation to him dated February 18, 1944, advising him that he would not waive his right to apply for citizenship by claiming exemption. He also showed a letter from the Alien Section of the Selective Service addressed to Colonel McDermott, dated, stamped February 12, 1944, in which Selective Service itself acknowledged through one Harold M. Hays, who spoke for the director, calling attention to the fact that the claim for exemption in this case is by virtue of a treaty, and also stating that Form 301 would be revised to fit the needs of the case, referring undoubtedly to the form signed by the applicant; and over his signature there is no waiver of citizenship or right to claim citizenship as there is in the former form.

In view of the fact that this comes as a surprise to the Bureau I will continue the matter to such time as may be agreed upon.

Mr. Addelson: I would like to have ninety days.

The Court: At the suggestion of the Examiner this matter will be continued for ninety days.

I also hand you, the Examiner, a copy of petitioner's memorandum which I suggest you scrutinize.

[fol. 61] I suggest to the Bureau in its present form the opposition to the granting of the petition is ill-grounded because it proceeds upon the assumption that the petitioner signed Form 301 containing an express waiver for citizenship, and that the only opposition now tenable would be on the theory that the treaty was overridden and repealed by virtue of the Selective Service Act. Even so there still does not appear on the record anywhere a waiver by the petitioner of his right to apply for citizenship.

If there is no objection I will retain jurisdiction over the cause, and should it appear that the date can be advanced by agreement, I presume I will be notified so that I may set it for an earlier date.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

(Signed) Eli C. Trumbower, Official Court Reporter, U. S. District Court.

[fol. 62] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

Petition No. 458512

In the Matter of the Petition of PAUL MOSER, to be admitted to become a citizen of the United States of America

Transcript of Testimony and Proceedings

Brooklyn, New York, June 9, 1949.

Before Honorable Harold M. Kennedy, U. S. D. J.

APPEARANCES:

Morris E. Vogel, Esq., Attorney for the Petitioner.

Mr. E. A. LaMothe, Mr. Harry Addelson, Examiners for the United States Immigration and Naturalization Service.

[fol. 63] PAUL MOSER, the petitioner, having been first duly sworn, testified as follows:

The Court: Mr. Moser, the last time you were here there was a question whether or not you had claimed that under the Treaty of Switzerland you had a right not to be drafted. Do you remember that?

The Witness: That is right, sir.

The Court: And you said that the form which they gave you to fill out and sign was not agreeable to that treaty and that you took steps through your Consul to have a form furnished you which did not contain the statements that you in effect waived your right to become a citizen. Do you remember that?

The Witness: That is correct.

The Court: And that Counsel furnished that form here and on that basis I took a continuation of the case?

The Witness: Yes, sir.

The Court: So that it could be explored. Now at the time of the signing of that form had you already filed a petition for citizenship?

Mr. Vogel: No, your Honor; you mean at the time he signed that application.

The Court: Yes.

Mr. Vogel: No, the petition was filed in 1948.

Mr. Addelson: It was filed in 1942; he had a petition already on file.

Mr. Vogel: Oh, no; the present petition that is pending before your Honor.

The Court: I am not speaking of that.

[fol. 64] Mr. Vogel: I am sorry.

The Court: At the time you signed that form—what do you call it?

Mr. Addelson: DSS 301.

The Court: Didn't you already have a petition for citizenship on file?

The Witness: No.

The Court: Hadn't there been one filed by you in 1942?

The Witness: Yes, your Honor.

The Court: Didn't you say in this form, "I have not declared my intention to become a citizen of the United States."

The Witness: Your Honor, after my return from Switzerland in 1940 I had a first paper, paper for 1940, the immigration officer took that paper away and told me I have lost my rights since I re-entered the States on an immigration visa, I could not enter under that; so in 1942 I went down to the old immigration house in Washington Street on the river there and I asked them if I am eligible for citizenship and the fellow told me who examined it, that I cannot do that since I lost my first papers and that I am regarded as immigrated on a new immigration quota in 1940, that I have to take out new first papers or wait three years. I married an American citizen.

The Court: Well, the point of inquiry is simply this: In your correspondence with your consulate you emphasized the fact that the treaty protected you only if you were a non-declarant.

The Witness: That is right.

[fol. 65] The Court: Now, were you or were you not a non-declarant at the time you signed this paper on February 28, 1944?

The Witness: At the time I was a non-declarant.

The Court: Well, you had previously filed a declaration, hadn't you?

The Witness: Yes, but the immigration authorities told me that I have lost that since I left this country.

The Court: They told you those papers were null and void?

The Witness: That is right, they took them away.

The Court: What did they take away?

The Witness: The first papers.

The Court: What did you have in the shape of first papers?

The Witness: It was a paper with my photograph on.

The Court: A paper with your photograph on it?

The Witness: Yes, sir.

The Court: Do you know what it is?

Mr. LaMothe: That is the declaration of intention, but that was submitted with his application when he filed his petition. We never take anything away from anybody.

The Court: Now, to keep the record straight, this paper dated February 28, 1944 will be marked Court's Exhibit 1.

(Marked Court's Exhibit 1.)

The Court: Is this your signature on this paper?

The Witness: Yes, sir.

[fol. 66] The Court: This paper will be marked Court's Exhibit 2.

Mr. LaMothe: No, that is part of the Court record.

The Court: Will be deemed marked Court's Exhibit 2, it being a declaration of intention dated March 9, 1938 and bearing the serial number——

Mr. LaMothe: On the top, Judge, on the right hand corner.

The Court: It has several numbers—411089, also 458512, also 330801. There is also a certification number.

Mr. LaMothe: That is the original number applied to his application when it was first received. It is 2/, isn't 2/ something?

The Court: Yes.

Mr. LaMothe: That is our symbol. Now on the top there is another number that is awarded to the first paper by the clerk's office; I believe that is 341 something, it is a 300,000 number.

The Court: 330.

Mr. LaMothe: And then the applicable number is applied to his petition, that is given when he appears with his two witnesses and files his petition with the clerk's office.

The Court: Yes.

Now I will also have marked, please, the letter of the Vice Consul, dated February 3, 1944, which is Court's Exhibit 3.

(Marked Court's Exhibit 3.)

[fol. 67] The Court: I will also have it marked, please, two carbons of letters, one dated January 24, 1944 and the other dated January 25, 1944.

(Marked Court's Exhibits 4 and 5.)

The Court: Have you seen those letters, Mr. Addelson?

Mr. Addelson: No, I didn't.

The Court: That was in January, he made a full disclosure to the consul.

Mr. Vogel: I just want——

The Court: Go ahead, Mr. Addelson.

Mr. Addelson: May I be permitted to ask the petitioner some questions?

The Court: There is a written document that shows he told the Consul General all about his application, it couldn't have been concocted.

By Mr. Addelson:

Q. What is your occupation, Mr. Moser?

A. A civil engineer.

Q. And you had your education over in Europe?

A. In Switzerland, yes, sir.

Q. And how old are you?

A. Now?

Q. Yes.

A. 37.

Q. You filed a declaration of intention according to the record in 1938?

A. That is correct.

Q. And you left the United States in 1940?

A. Yes, sir.

[fol. 68] Q. Did you leave the United States with the idea of abandoning your residence in this country?

A. I left the United States at that time to join the Swiss Army and I did not give it any thought, that times were so insecure, how long I have to stay in the Army, it was in the beginning of the war. However, my intentions were always to return to the United States.

Q. And you say that you were told by an immigration officer after your return that your residence before didn't count, that everything you did before didn't count; is that right?

A. That is correct.

Q. When you submitted your application to file a petition for naturalization you gave as your arrival, your original residence on December 29, 1937?

COLLOQUY

Mr. Vogel: I object to that, your Honor. That isn't correct. I have a duplicate in my office.

Mr. Addelson: I have the original here.

The Court: Let me see them both.

Mr. Vogel: If there were any changes made, I don't know.

Mr. Addelson: I am talking about the first petition. You are talking about the second one.

Mr. Vogel: I am talking about the petition presented in court today—I am talking about the petition here in court. This is the one we filed and it says that he arrived in 1940.

The Court: What is the last exhibit number?

The Clerk: 3.

The Court: That cannot be. Now the record should reflect the following:

That the photostat copy of the form DSS 301 revised is Exhibit 1.

[fol. 69] The declaration of intention, whose numbers I have already given—330801, 411089, 458512—dated March 9, 1938 is deemed to be marked Exhibit 2.

The letter from the Consulate General dated February 3, 1944, signed by Charles E. Rosset is Exhibit 3.

Copy of a letter addressed to the Consulate General of Switzerland dated January 24, 1944 is Exhibit 4.

Copy of a letter to the Swiss Legation dated January 25, 1944 is Exhibit 5.

Mr. Addelson produces a petition on form A-2214.

Mr. Addelson: That is an application to file a petition.

The Court: An application on form A-2214, hand printed, bearing various corrections in red ink. That is deemed to be Exhibit 6.

Mr. Vogel produces a typed copy of form N-400, unsigned and undated. That is Exhibit 7.

Now to add to that should be a photostatic copy of a letter from Harold M. Hayes to the director of Selective Service for New York, which is Exhibit 8.

A letter from Paul Moser dated January 29, 1944 to Local Board No. 14, marked Exhibit 9.

A letter from the Legation of Switzerland to Paul Moser dated February 18, 1944, marked Exhibit 10.

Now, I don't know what the solution of the discrepancies between these two papers——

Mr. Vogel: If your Honor please, I believe I can explain because I used to work in the immigration bureau in the capacity of examiner.

[fol. 70] Now, the procedure is this: Applicant files a paper, of which I gave you a copy. When the applicant appears with his witnesses before the preliminary examiner, he is called alone, of course counsel is not present, the preliminary examiner makes corrections which are to conform to any questions he puts to the applicant and also to any documents he may have in the file.

Now, although our application recites an arrival of 1940, the file of the immigration service probably showed also the original arrival prior to his departure for service in the Swiss Army, and the preliminary examiner, either erroneously or because he felt it didn't make any difference, took the original arrival and you will probably find that change in red ink.

Mr. Addelson: Your Honor, might I say something?

The Court: Yes. I wanted to see if I could find the solution because the two papers are entirely different.

Mr. Vogel: Are you looking at the petition that was filed in 1948?

Mr. Addelson: Your Honor, I think I can explain this thing without any trouble if I am permitted, if I may.

The Court: Go ahead.

Mr. Addelson: This man filed two petitions for naturalization. Both of these petitions are predicated on entries dated December 27, 1937. There was a question raised in connection with his first petition by reason of the absence which he refers to and which he said he came back [fol. 71] and was notified by the immigration authorities that his residence was broken and so forth.

The Court: Yes.

Mr. Addelson: A question and answer statement was taken from the petitioner by an officer of this service on February 5, 1943 in connection with his original petition for naturalization. At that time the petitioner stated that when he left the United States it was his full intention to return to this country and the facts relative to his absence were submitted to our central office in Washington and they ruled that there was no break of residence there at all and they authorized us to continue with the petition for naturalization filed in 1942. I want to introduce that as an exhibit.

According to our records, the petitioner was notified on four different occasions to appear for final hearing on his petition filed in 1942. He was notified on June 5, 1944—was absent. He was notified on January 29, 1945 and was absent. And he was notified on March 19, 1945 as well as on April 30, 1945. His petition was finally dismissed for lack of prosecution on July 5, 1945.

He knew at the time that he filled out DSS form 301 that his residence was dated from 1937, he had a declaration of intention on file at that time, and I might add that he first registered for Selective Service in the early part of 1941 right when the first draft started, right before the war, and on March 4, 1941 he was placed in Class 3-A because of dependency. Wasn't that true?

[fol. 72] The Witness: I don't remember whether it was dependency or not.

Mr. Addelson: But you were placed in Class 3-A, weren't you?

The Witness: I think so.

Mr. Addelson: You knew that that was a deferred classification.

The Court: He didn't claim any exemption. Did he claim exemption, Mr. Addelson?

Mr. Addelson: I have got the original form here showing

the reasons that he thought he ought to be placed in Class III or IV.

The Court: He didn't claim he was a neutral and couldn't be made to serve.

Mr. Addelson: He gave three reasons why that was: That he was expecting a child, that he was a citizen of Switzerland, and that he was for approximately two years in the armed forces of Switzerland—that is what he stated there—and on January 11, 1944, according to—and I want to introduce both of these documents in evidence—according to a letter from the Selective Service records, he was placed in Class 1-A as available for service. It was after that that he himself got in touch with the Swiss Consulate to be relieved from service under the Swiss treaty. Now, apparently there was some correspondence between the petitioner——

The Court: Not apparently, I have a copy of it here.

Mr. Addelson: I am quoting:

"There exists, therefore, now the possibility that such exemption can be obtained by compatriots who qualify, [fol. 73] without the necessity of forfeiting the right thereafter to become an American citizen, if the request is based on Article II of the treaty of friendship, commerce and extradition, between the United States and Switzerland of November 25, 1850. Such a petition, however, can only be submitted by the Legation on behalf of the non-declarant Swiss registrant."

And then he wrote this letter to the Swiss Legation:

"As a non-declarant Swiss national, I claim unconditional release from the liability for military service under the provisions of Article II of the treaty of friendship, commerce and extradition, concluded between the United States of America and Switzerland on November, 1850."

The Court: Please bear with me a minute while I call your attention to this: Your claim is substantially fraud. On January 24, 1944 this man wrote to his Consulate General as follows:

"In 1937 I immigrated to the U. S. A. from Canada and shortly after I took out first papers. On May 11, 1940 I returned to Switzerland to join our Army in the field. Upon

leaving this country I did not take out a re-entry permit and I lost so all rights ever to return as a resident of the U. S. A. In September 1940 I was forced to apply on the U. S. Consulate in Zurich for a new immigration visa, and I arrived in New York, on October 11, 1940 under a new immigration quota."

Now, I will not find fraud in the face of that letter.

[fol. 74] Now, if he in good faith told the Swiss Consul, "I am a non-declarant and claim my rights under the treaty," and he signed this revised form DSS 301, which I find as a fact, what are the legal results that flow from it?

Mr. Addelson: I say that the statute supersedes the treaty, and I have got several citations here to back up my position, your Honor.

The Court: You say that the Selective Service Act revokes that treaty?

Mr. Addelson: Supersedes the treaty in so far as it is inconsistent with the treaty.

The Court: What about the action of the Selective Service in changing the form, which is an administrative interpretation of its own power? Is this man to be the goat?

Mr. Addelson: I can't see how he is the goat. It is on the same form, it is written as plain as can be.

The Court: We have gone all over that backwards and forwards.

Now had this man been told plain out by the Selective Service that the Selective Service Act supersedes the treaty non-constat, he wouldn't have signed the form at all. He might have said, "Very well, I am going to serve." Don't you recognize any equity in his position?

Mr. Addelson: I am not so sure that he would have served if he did know.

The Court: Mr. Moser, if they had said to you, "Although the treaty is in existence, we, the United States of America, won't recognize it and if you claim an exemption [fol. 75] from service as a neutral you are forever barred from citizenship," would you have made such a claim?

The Witness: I would have served, your Honor.

The Court: Your wife is an American?

The Witness: She is an American citizen.

The Court: I find as a fact as follows in this case——

Mr. Addelson: May I have the permission to submit a brief in this case?

The Court: Surely, on the law alone.

Mr. Vogel: He has had my memorandum for three months.

The Court: I am not going to make any snap judgment. He has made a remarkable statement that the Selective Service Act supersedes the treaty with Switzerland. He is asking me to hold that as a matter of law and I want to see those cases, I am ignorant about them.

The facts in this case are as follows:

The petitioner, Moser, filed a petition for citizenship. It then developed that on February 26, 1944, he had filed with the Selective Service Local Board 14, an application for release from military service. This application was on a revised form DSS 301. There isn't in the body of that form any reference to Section 3a of the Selective Training and Service Act of 1940, as amended.

It then developed that on February 3, 1944—no, that on January 24, 1944 Moser had written to his Consulate General, he explained in the letter, which is in evidence, the fact that on a prior occasion, in 1937, he had applied for citizenship but he then believed that he lost his right to first papers as a result to return to the Swiss Army.
[fol. 76] At that time, on January 24, 1944, he took the position that he should be deferred from service because he had the status of an alien without first papers.

By supplementary letter of January 25, 1944 he furnished further facts.

On February 3, 1944 he was advised by the Consulate General of Switzerland, the letter which is in evidence, that since Moser was a non-declarant Swiss alien he could be unconditionally released from service.

The legation of Switzerland notified him, also by a letter, on February 18, 1944, that he had rights under the Treaty of Friendship, Commerce and Extradition concluded between the United States and Switzerland on November 25, 1850. The letter states that the legation was requesting the Department of State to exempt him from liability, and also there was included a DSS form 301, revised, the word "revised" being underlined. He was then advised by the legation that through the filing of form DSS 301, "You will not

waive your right to apply for American citizenship papers."

On these facts, it is necessary to find that if the treaty between Switzerland and the United States is still in force, Moser is surely entitled to citizenship, there was no fraud of any kind on his part, he honestly believed that he was a non-declarant alien, he honestly believed that he had lost any benefit obtained by his first papers. He made full disclosure of the fact in connection with his claim of exemption, and nobody advised him that the fact that he had filed [fol. 77] first papers, which lapsed, had any effect upon his rights.

It is my belief, and I find as a fact, that if in January, 1944, he had been told that the Swiss treaty was superseded by the Selective Service Act and that he must face the choice either of serving in the American Army or waive forever his right to become an American citizen, that he would have elected to do the former. Any other interpretation of these facts is impossible in the light of the fact that he had an American wife and three children here.

The only question is whether or not that Treaty was in force in January, 1944—if it was, whether there is any way that Moser can be restored to his status quo, namely, can still obtain citizenship, in spite of the fact that as a matter of dry legal context he may have inadvertently waived that right.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

(Signed) Frank J. Carey, Official Court Reporter, U. S. District Court.

[fol. 78] In United States District Court

[Title omitted]

Approval of Counsel Fees—July 21, 1949

The Court: I approve the arrangements between the petitioner and his attorney for his fees covering all services [fol. 79] to the petitioner, including all disbursements of all kinds up to the present date.

I hereby certify that the foregoing is a true and accurate transcript from my stenographic notes in this proceeding.

(Signed) Daniel D. Simon, Official Court Reporter, U. S. District Court.

[fol. 80] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

No. 458512

In the Matter of Petition of PAUL MOSER for naturalization

Appearances:

Harry Addelson, U. S. Naturalization Examiner, attorney for government.

Morris E. Vogel, attorney for petitioner.

OPINION OF THE COURT—July 15, 1949

KENNEDY, J.:

This controversy arose out of a petition for naturalization. Proof was taken at two brief sessions, and at the close of one I dictated findings of fact, which I need advert to only briefly here for the sake of clarity.

The petitioner is 38 years of age and a native of Switzerland. He is the father of three children, all of whom are native-born citizens of the United States. He originally entered the United States in 1937 and on March 9, 1938, he petitioned for naturalization in the Southern District of New York. But before action on this petition was completed and on May 11, 1940, Moser, who was then an active officer of the Second Engineers Battalion of the Swiss [fol. 81] Army and on leave of absence, was ordered to return to Switzerland, because at that time the Swiss feared an attack by the Nazis. In October 1940 Moser was permitted to return to the United States. He still retained his status as an active officer in the Swiss Army in the same regiment, but was again on leave of absence. In 1945 he was placed on reserve. In the meantime on October 19, 1940, the petitioner registered under the Selective Training and Service Act of 1940, as amended. He at that time requested the advice of the Swiss Legation with respect to his

obligation for military service in the armed forces of the United States, having in mind particularly, the Convention of Friendship, Commerce, Extradition, etc. between the United States and the Swiss Confederation, concluded on November 25, 1850 (11 Stat. 587; Malloy's Treaties and Conventions, Volume 2, p. 1763).

The Swiss Legation then took the matter up with the State Department, and after a number of conferences, our own State Department decided that the Selective Training and Service Act of 1940 was not intended to deny Swiss nationals any rights or privileges conferred on them by the treaty. Accordingly, through correspondence with the selective service authorities, the American State Department expressed the view that the filing of a claim for exemption from military service by non-declarant friendly aliens like Moser should not operate as a waiver of forfeiture of naturalization rights. The form for such claims of exemption, referred to as DSS Form 301, was then revised particularly to exclude a sentence reading in part as follows:

> "I understand that the making of this application, to be relieved from such liability, will debar me from becoming a citizen of the United States * * *"

[fol. 82] In the form as revised, reference to the legal effect of a claim to be relieved from liability for training and service was merely dropped into a footnote so that instead of being a part of the document itself, it operated merely to call attention to the provisions of the statute. However, that in Moser's case even the footnote is meaningless is evidenced by the correspondence between himself and the Swiss Legation, and between the Legation and the State Department, this undeniable effect of which is that our own State Department took the position that the treaty rights of Swiss nationals were preserved and that they could claim exemption from American military service (at least while they were non-declarants) without waiving rights to naturalization in the future.

When the case first came for hearing, the naturalization service was clearly under the impression that Moser had signed the original form DSS 301, which amounts to an express waiver of naturalization in the future. Moser's attorney called attention to the fact that this was not the

form of waiver that his client had signed; that on the contrary he had executed a waiver revised by agreement reached by the State Department, the Swiss Legation, and the Selective Service Bureau. Moser had signed this revised form on February 26, 1944.

The Naturalization Service then asked for a continuance on the ground of surprise, which was granted. At the continuance it proposed a new theory why naturalization should be denied; it said that Moser had perpetrated a fraud in procuring and executing the revised form DSS 301, because as a matter of fact he was not then a non-declarant alien, but had filed a petition for citizenship in 1938. Moser's uncontradicted explanation of the facts in that con- [fol. 83] nection were as follows: After he had filed his petition, he was, as noted above, ordered back to Switzerland. When he was able to re-enter he was told by the authorities that he would need a new visa, and would re-enter under the 1940 quota, which he did. He discussed this with someone in the naturalization bureau who told him that this had the effect of invalidating his then pending application for citizenship, a statement which he believed to be true. And the record bears this out, because in all the proceedings in connection with the first petition Moser failed to appear and the petition was ultimately dismissed. The filed papers in the first case also strongly bear out Moser's contention that it was void in the light of his departure for military service in the Swiss army. But more important than all this: Moser made full disclosure of his first petition to the authorities when he attempted to clarify his treaty rights.

Faced with these facts, the naturalization bureau then fell back on the claim that the Selective Training and Service Act of 1940, as amended, superseded the treaty made between the United States and Switzerland in 1850, and that no matter what our State Department or selective service bureau had done, Moser, as matter of law, had waived his right to become naturalized, even though his specific intention to the contrary was proved and even though American government agencies had induced him to sign the "waiver" while they were under a completely erroneous notion of what the law was.

To support this remarkable contention, the bureau cites a number of cases, but I shall refer particularly to one of these (*In re Trachsel*, D. C. S. D., Ohio, W. D., 1921, 271 F.

779). Trachsel was a *declarant* alien and a citizen of Switzerland. His declaration of intention contained a renunciation of allegiance and fidelity to the Swiss Confed- [fol. 84] eration. (*Cf.* Moser's case: when he filed the instant application he was in the judgment of both the American and Swiss authorities a non-declarant alien after full disclosure by him of the proceedings in connection with his first petition.) Trachsel claimed his rights under the same treaty as that invoked by Moser, and in dealing with this fact the court in the *Trachsel* case lays down the law that an act of Congress later than a treaty supersedes the latter. The bureau quotes that sentence but omits to continue the quotation to include the very next sentence, which points out that the local board honored Trachsel's claim for exemption, and that its action was not under review by the court dealing with Trachsel's case. In other words, the case is no authority at all on the point here involved.[1]

But, ignoring the precedents, it is perfectly obvious that to the extent treaties may be affected, the pertinent language of the Conscription Act of 1917, 50 U. S. C. A. §226 note, is very different from that found in the Selective Training and Service Act of 1940. The 1917 act imposed a liability to military service upon all male citizens not alien enemies who had declared their intention to become citizens. This express provision might well be considered an evidence of intention on the part of Congress to supersede pro tanto all treaties inconsistent with such liability. The 1940 act on the contrary imposes a liability (Section 3(a)) on all male citizens of the United States and all male persons residing in the United States. There is then a proviso that any neutral citizen may relieve himself from liability, and a further proviso that if he does, he shall thereafter be debarred from becoming a citizen of the [fol. 85] United States. But this proviso may not be at all inconsistent with a treaty such as the Swiss Treaty of 1850, which relieves its nationals of liability to American military service.

But to me it means that verbal gymnastics in this case become quite irrelevant. Nothing could be clearer than the fact that our own State Department recognized the im-

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[1] The decision is merely that Trachsel abandoned his petition when he claimed exemption.

munity that Moser had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed the revised form DSS 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the Swiss treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940, I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted.

Harold M. Kennedy, United States District Judge.

Dated: Brooklyn, New York, July 15, 1949.

This opinion is reported in 85 F. Supp. 683 (D. C., E. D. N. Y., 1949).

[fol. 86] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO RECORD ON APPEAL

It is hereby stipulated and agreed by and between the attorneys for the parties in the above matter that the foregoing is the record of the United States District Court for the Eastern District of New York in the above entitled cause, as agreed upon by the parties.

Dated: Brooklyn, New York, March —, 1950.

J. Vincent Keogh, United States Attorney, Eastern District of New York, Attorney for United States of America, Appellant. Morris E. Vogel, Attorney for Appellee.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1949

No. 227

(Argued May 5, 1950. Decided June 14, 1950)

Docket No. 21642

In the Matter of the Petition of PAUL MOSER to Be Admitted to Become a Citizen of the United States of America,

UNITED STATES OF AMERICA, Appellant,

PAUL MOSER, Appellee

Before L. Hand, Chase and Clark, Circuit Judges

Appeal by the United States from an order of the District Court for the Eastern District of New York admitting an alien to citizenship. Reversed.

[fol. 89] Morris E. Vogel, Attorney for Appellee.

J. Vincent Keogh, United States Attorney, Attorney for United States of America, Appellant.

Edward S. Szukelewicz, Assistant United States Attorney, of Counsel.

CHASE, Circuit Judge:

Paul Moser, a native and citizen of Switzerland, was admitted to the United States on December 29, 1937 for permanent residence. He filed a declaration of intention to become a citizen in the District Court for the Southern District of New York on March 9, 1938 but on May 11, 1940 left voluntarily for Switzerland where he served as an officer in the Swiss Army until he was released from such duty in the fall of that year. He reentered the United States lawfully on October 11, 1940 as a non-quota immigrant returning to an unrelinquished domicile and has since resided in the City of New York. He married an American citizen on October 19, 1940 and has three children born in this country of that marriage.

On March 27, 1942 he filed a petition for naturalization alleging his marriage as above stated and claiming the exemptions accorded the spouses of citizens under the

provisions of the Nationality Act of 1940. 8 U. S. C. § 710 (b). This petition was dismissed in July 1945 for lack of prosecution.

Meanwhile he had registered in accordance with the provisions of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 301 *et seq.*, and on January 15, 1941 had filled out a questionnaire in which he requested either Class III or Class IV classification. He was classi- [fol. 90] fied in Class III-A. On January 11, 1944, however, his classification was changed to I-A and on January 24, 1944 he applied to the Swiss Consulate in New York for assistance in obtaining deferment.

Article II of the Treaty of November 25, 1850 between the United States and Switzerland was in force at all times now material and provided, so far as here relevant, that

"The citiz ıs of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service."

He desired to take advantage of the above quoted provisions and the Swiss Legation at Washington was so informed. It had previously had some conversations with our Department of State in which it had put forth its view that Swiss nationals were entitled to deferment under the treaty without being thereby debarred from becoming American citizens in accordance with the provisions of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 303(a).

The above section of the statute contained a proviso "that any citizen or subject of a neutral country shall be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States; * * * " And Section 316(a) of Title 50, U. S. C. App. provided that, "except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force."

[fol. 91] As a result of the efforts of the government of Switzerland and of those made by other governments hav-

ing similar treaty exemptions for their nationals, the form, known as DSS Form 301, which had been previously prescribed under the above statute in accordance with the Selective Service Regulations for execution by neutral aliens desiring to claim exemption from military service because of that status, was revised on March 16, 1943. The following clause, "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States" was deleted and the above quoted proviso in Sec. 3(a) of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 303(a), was printed on the form though not in that portion of it above the applicant's signature.

On February 18, 1944, the Swiss Legation wrote the appellee that it had requested exemption for him under the treaty provisions and enclosed two copies of revised DSS Form 301, which he was instructed to "execute and file immediately with your Local Board." He was also told that this was necessary "to complete the exemption procedure" and that his Local Board "will then classify you in Class IV-C" which was the exempted classification he desired. This letter ended with the following paragraph:

"Please note that, through filing of DSS Form 301, revised, you will not waive your right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts."

The appellee excuted both copies of the form, filed them with his Local Board, and was classified in Class IV-C. In doing so he represented that he was a non-declarant alien and the contention was made below that he fraudulently so [fol. 92] stated, but that issue was resolved in his favor and is not now of moment.

This appeal is from an order admitting the appellee to citizenship and the overall question presented is whether under Article II of the treaty he was entitled to secure exemption from service in the armed forces of the United States without losing whatever rights he otherwise might have to become an American citizen.

While it is plain enough that the treaty did give the appellee immunity from such service, it is equally plain that it did not require him to take advantage of that im-

munity unless he so desired. To be sure the only express condition upon his acceptance of exemption was his liability for whatever pecuniary contributions were exacted from citizens in lieu of military service. This was evidently done to prevent discrimination against citizens and, we think, cannot be treated as an agreement that treaty nationals would be relieved from military service without affecting their status in other respects at all.

The treaty is silent on the subject of the acquisition of citizenship by nationals of either country residing in the other and so far as we are presently informed that subject was not considered when the treaty was made. See 3 Hackworth, *Digest of International Law*, pp. 598-612. In our opinion this treaty is without significance in respect to the right of either country to impose what conditions it sees fit upon the admission to citizenship of nationals of the other. It follows that Section 3(a) of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App. § 303(a), did not, by granting exemption from military service to all neutral aliens and at the same time debarring all such who applied for it from ever becoming an American citizen, contravene the treaty.

It would also seem plain that Congress intended to have the above statute apply to so-called "treaty aliens" like [fol. 93] the appellee. There is nothing in the statute which limits the words "any citizen or subject of a neutral country" to citizens or subjects of neutral countries which had no treaty granting its citizens exemption from military service. Indeed the statute broadly provides that, "Except as otherwise provided in this Act, every other male person residing in the United States" shall, if within designated age limits, be liable for military training and service. Nor is there anything in the legislative history of the Act of 1940 to show that Congress did not intend the language it used to be as comprehensive as it appears to be.

The Swiss treaty did not undertake to provide how its nationals should claim exemption from military service or how it should be granted them. It had to be, and was, implemented by an Act of Congress. The forerunner of the Act of 1940 was the Selective Draft Law of 1917. 50 U. S. C. App. § 201(a). Ultimately that subjected to military service neutral aliens who had declared their intention to become citizens, but only upon their consent, and provided that they could dissent only by withdrawing their

declarations, which would debar them from ever becoming citizens. Originally, it was proposed to draft all male declarant aliens. A State Department official then suggested to Senator Hitchcock the exception of neutral aliens to comply with our "reciprocal naturalization" treaties. 56 Cong. Rec. 8415, 8418. No one apparently thought such a treaty as this would be affected by the law as passed. See 56 Cong. Rec. 8415-19, 8485. The present statute is unlike the 1917 Act in that it makes no distinction between declarant aliens and non-declarant aliens but that for present purposes is unimportant. A declaration of intention to become a citizen leaves an alien still an alien. Swiss citizens are no different from other aliens in this respect. See 3 Hackworth, *Digest of International Law,* pp. 192-94. So it seems abundantly clear that this [fol. 94] statute was designed to treat alike aliens who were treaty-exempt from military service and those who were not. While in our opinion there was no violation of the treaty with Switzerland in doing so, even if there had been, the statute would control. *Head Money Cases,* 112 U. S. 580; *Pigeon River Co.* v. *Cox,* 291 U. S. 138, 160; *Ex parte Green,* 2 Cir., 123 F. 2d 862, cert. denied *sub nom. Green* v. *McLaren,* 316 U. S. 668.

The appellee, however attempted to obtain his exemption not under the above statute but under the treaty and he did so because he wished to become an American citizen as well as to get exemption. Indeed, we should recognize that his desire to become an American citizen was paramount in his mind, for the court below has found, because it believed appellee when he so testified, that he would not have sought exemption had he known that it would deprive him of naturalization rights. So it is argued (1) that he did not waive any rights by applying for exemption and (2) that, even if he did, the United States is estopped from so asserting because of the revision of DSS Form 301 after negotiations with treaty countries as above stated.

We agree that the appellee waived no treaty rights when he applied for exemption. But we do not agree that on the facts here shown the government is estopped from enforcing the statute in this instance, assuming without deciding, that estoppel would, if shown, have such effect. So far as appears, all the government did was to relieve applicants for exemption from formally acknowledging in writing that they understood their application would

prevent their becoming citizens and to leave the effect of their application to be decided as the law might require. That the Swiss Legation so understood is shown by the letter it sent the appellee advising him that filing the revised form would not be a waiver of his "right to apply for American citizenship papers. The final decision regard- [fol. 95] ing your naturalization will remain solely with the competent Naturalization Courts." This assurance from the Swiss Legation was at most only its own interpretation of the effect of the appellee's application for exemption from military service on his right to apply for citizenship. Even if "right to apply for" can be stretched to be synonymous with "right to obtain" citizenship that would not bind this government. And at the least it was a caveat that informed the appellee that in the end his right to citizenship would be determined by the proper court.

It should be noticed that the claimed estoppel is not based, so far as appears, upon any assurance given by an authorized representative of this government that Form 301, revised, was not an application for exemption from military service in the manner prescribed by the statute, as indeed it was. Nor does the appellant now claim that he did not know it was such a form which he signed with intent thereby to obtain exemption. That he did not fully comprehend the legal consequences of his act, through no fault of this government, does not entitle him to any relief from the disability which the statute has made the result of his exemption. This does seem, however, to be an appealing case for legislative action.

Judgment reversed and petition dismissed.

[fol. 96] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of June one thousand nine hundred and fifty.

Present: Hon. Learned Hand, Chief Judge; Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

PAUL MOSIER, Petitioner-Appellee,

v.

UNITED STATES, Respondent-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and petition dismissed in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 97] [Endorsed:] United States Court of Appeals, Second Circuit. Paul Moser v. United States. 227. Judgment. United States Court of Appeals, Second Circuit. Filed June 14, 1950. Alexander M. Bell, Clerk.

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] SUPREME COURT OF THE UNITED STATES

No. 301, October Term, 1950

ORDER ALLOWING CERTIORARI—Filed January 2, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 301

PAUL MOSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND BRIEF IN SUPPORT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

PAUL MOSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND BRIEF IN SUPPORT

The Petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit (R. 94) which reversed an order of the District Court (R. 4) admitting petitioner to citizenship.

Opinions Below

The Court of Appeals opinion is reported in 182 F. (2d) 734 and is set forth at page 88 of the Record. The District Court opinion is reported at 85 F. Supp. 683 (R. 80).

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the Treaty of Friendship and Commerce between the United States and the Swiss Confederation concluded November 25, 1850 exempting the nationals of each country residing in the other from personal military service granted unqualified relief from such military service without the penalty of permanent ineligibility for American citizenship.

2. Whether the provisions of the Selective Training and Service Act of 1940 (50 Appendix U. S. C. 303a) authorizing neutral aliens to claim exemption under the Act upon condition that such exemption claim shall operate as a bar to American citizenship superseded or modified the aforesaid treaty.

3. Whether an exemption claim by a neutral Swiss alien asserted under the aforesaid treaty and not under the Selective Training and Service Act incurs the citizenship ban of the Selective Training and Service Act which by its express terms was applicable only to those "relieved from liability for training and service under this act."

4. Whether or not the petitioner, in claiming the aforesaid exemption, is debarred from citizenship as a matter of law, where the exemption was not obtained by him as a neutral alien, in the manner prescribed in the Selective Service Regulations, but rather was obtained for him as a Treaty alien pursuant to the Swiss Treaty of 1850, in accordance with a special procedure agreed upon between

our own State Department, the Selective Service System and the Swiss Legation.

5. Whether in any event, on the facts here shown, the Government is estopped from enforcing the provisions of 50 U. S. C. App. 303a in this instance, particularly when it expressly revised the application for exemption (Form 301) and relieved petitioner from formally and affirmatively acknowledging, in writing, that he understood his application would bar him from citizenship.

6. Whether the citizenship ban of the Selective Training and Service Act of 1940 expired when the applicable provision of the said Act (50 Appendix U. S. C. 303a) were no longer operative.

Statutes and Treaties

Article II of the Convention of Friendship, Commerce, Extradition, etc., between the United States of America and the Swiss Confederation, concluded November 25, 1850, and proclaimed November 9, 1855, reads as follows: (11 Stat. 587; Malloy's Treaties and Conventions Vol. 2, p. 1763).

"Article II

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required by way of compensation, from citizens of the country where they reside, who are exempt from the said service."

Section 303(a) of Title 50, Appendix, United States Code, pertaining to exemption of neutral aliens from military service, reads in part as follows:

> "Persons liable for training and service; number; term; status after completion of term; pay; allowances; and benefits; place of employment

(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . ."

Section 316(a) and (b) of Title 50, Appendix, United States Code, relating to the suspension of laws conflicting with the Selective Training and Service Act of 1940, and the expiration of the Act reads as follows:

"Suspension of conflicting laws; expiration of Act; appropriations.

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) The provisions of the third sentence of section 3(a) of this Act (section 303(a) of this Appendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act (sections 301-303, 304, 305, 306-309, 310, and 311-318 of this Appendix), except the provisions of section 3(b), 3(c), 3(d), 8, and 16(b) (sections 303(b), 303(c), 303(d), 308, and 316(b) of this Appendix), and the fourth and fifth provisos of the second sentence of section 3(a) (Section 303(a) of this Ap-

pendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date." . . .

Statement

On November 25, 1850 the United States and Switzerland executed a Treaty granting the nationals of each country unqualified exemption from military service (11 Stat. 587). Article 94 of the Swiss Military Penal Code provides that Swiss citizens who enter a foreign army are liable to criminal penalties.[1] The Selective Training and Service Act of 1940 as amended (50 U. S. C. App. 303a) granted exemption under the Act from military service to nationals of neutral countries but such exemption claim operates as a bar to American citizenship [50 U. S. C. App. 303(a)].

On June 5, 1942, the Legation of Switzerland addressed a formal complaint to the Secretary of State (Appendix A, herein) asserting that the Selective Service Act of 1940 was "not reconcilable with the Treaty of 1850". It was alleged:

> "The enactment of this new law is evidently a departure of the United States from the general rule to conscribe for military service only 'citizens of the respective country' and does not seem to be in harmony with the international usage, according to which no neutral shall be compelled to serve in the armed forces of a belligerent country. The Swiss Government

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[1] Article 94 of the Swiss Military Criminal Code of June 13, 1927 (Nouveau Manuel du droit Suisse, 2 vols., Zurich, 1946-47, vol. 2, p. 632) reads:

> "Any citizen who, without the permission of the Federal Council enters foreign military service shall be punished by imprisonment."

(See also: *House Report 1991*, 81st Congress).

The records of our State Department will show that one, Peter Good (Gut) was recently sent to prison by the Government of Switzerland because he served in the United States Armed Forces during the War.

esteems, therefore, that the application of the Selective Service and Training Act as amended to Swiss citizens is not reconcilable with the Treaty of 1850.

"It is true that the new Selective Service Law provides for the possibility that a neutral alien may be released from all military obligations if prior to his induction in the armed forces of the United States, he has made application to be relieved from such liability, with the consequence, however, that any person who makes such an application shall thereafter be debarred from becoming a citizen of the United States. This provision, offering a possibility of exemption to a Swiss resident, may in many cases result in a practical solution, but on account of the accompanying consequences it cannot bring the Act in harmony with the Treaty of 1850, which mentions no conditions whatsoever for the exemption from military service. Under the new Act, Swiss citizens would be allowed to enjoy the privileges established by the Treaty solely if they fulfill a material condition not mentioned and not understood in the Treaty."

On July 6, 1942, the Secretary of State (See Appendix B herein) replied:

"In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above whether such requests be made by the nationals themselves or by you in their behalf."

Thereafter, the Swiss Legation informed its nationals of the procedure to be followed in claiming exemption under the Treaty of 1850 (Appendix C herein), advising them that under the Treaty a claim of draft exemption would not result in a forfeiture of the right to American citizenship (R. pp. 72-73, 76, 81).

In accordance with the procedure agreed upon between the State Department, the Selective Service System and the Swiss Legation, there was made through the State Department, a claim for draft exemption under the Treaty of 1850 for petitioner, a Swiss citizen and army officer, who is married to a native American citizen with whom he has three American-born children (Exhibit 8, 9, 10, pp. 34-39, 12). Petitioner executed a printed form for draft exemption which was specifically revised to omit the language contained in the regular forms with respect to the forfeiture of the right to apply for naturalization (Exhibit 1, R. pp. 16-17; Exhibit 1-A, R. pp. 19-21).

The petitioner believed that he was claiming draft exemption under the Treaty of 1850 and not under the 1940 Selective Service Act (Exhibit 9, R. 36). He testified and the District and Circuit Courts found that he would not have claimed draft exemption if he knew that the United States would not recognize the treaty and if he were to be barred from naturalization (R. 85, 92).

On March 31, 1948 the petitioner applied for naturalization and on July 21, 1949 the District Court for the Eastern District of New York admitted him to citizenship (R. p. 4). In its opinion, 85 F. Supp. 683, the District Court held (R. 85):

> "Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed the revised form DSS 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the

Swiss treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940, I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted."

On appeal, the Circuit Court reversed in an opinion (R. 88) which held (1) that the Selective Service Act of 1940 as amended was not inconsistent with the Treaty of 1850; (2) that if the Act was inconsistent, it superseded the treaty; and (3) that although petitioner attempted to claim exemption under the treaty rather than the statute, and although he waived no treaty rights, his exemption claim barred him from naturalization. The Circuit Court concluded that "this does seem, however, to be an appealing case for legislative action."

Reasons for Granting Certiorari

This case for the first time raises an important question of federal law involving international rights with Switzerland under a treaty concluded in 1850 (11 Stat. 587), the eligibility of several hundred Swiss nationals to naturalization and the construction of the Selective Training and Service Act of 1940 as amended (50 U. S. C. App. 303a). If left undetermined by the Supreme Court, the issues herein presented will recur under the 1948 Act (62 Stat. 605) and future Selective Service Acts. These issues relate to the citizenship eligibility not only of Swiss nationals but also of nationals of Spain (33 Stat. 2105, 2108), Costa Rica (10 Stat. 916, 921), Argentina (10 Stat. 1005, 1009); and Paraguay (12 Stat. 1091) with whom we have treaties containing reciprocal military exemption provisions.

1. Petitioner believes that the Selective Training and Service Act of 1940 was inconsistent with the 1850 Treaty but did not supersede it because Congress did not clearly

intend to annul rights acquired under the Treaty. Th Supreme Court has always been zealous to safeguard treat rights. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336; 2 *Hyd International Law* 1464 *et seq.* The decision of the Circui Court denies to petitioner the treaty rights he believed h possessed in conformity with the interpretation given th treaty both by the Swiss Legation and the State Depart ment. Because treaty rights are involved herein, affectin a large number of aliens—rights always carefully protecte by the Supreme Court—it is submitted that certiorar shou.d be granted.

2. Petitioner seeks the priceless possession of American citizenship. But it is important not only to petitioner but to the State Department and to the Government of Switzerland to know authoritatively through a decision of the Supreme Court whether nationals of Switzerland may effectively claim draft exemption under the Treaty of 1850 without forfeiture of the right to American citizenship, whether the Selective Training and Service Act of 1940 was inconsistent with the Treaty, and if so whether an exemption claim mistakenly asserted solely under the Treaty incurred the penalty of a bar to naturalization under the statute particularly where our own State Department and Selective Service System shared in that mistake. Finally there is involved herein an issue affecting a large group of aliens—whether the bar to citizenship continued beyond the operation of the applicable provisions of the Selective Training and Service Act of 1940 which expired without any savings clause prior to the filing of petitioner's application for citizenship. Insofar as the Circuit Court opinion ruled that the Selective Service Act of 1940 superseded the Treaty of 1850 it conflicted with the principle enunciated by this Court that an unequivocal Congressional expression to abrogate a treaty must appear before an Act

of Congress will be construed to violate an existing treaty. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336, *supra*.

The Circuit Court of Appeals reversed the District Court herein and disregarded the contemporaneous construction not only of the State Department but also of the Selective Service System that draft exemption might be claimed solely under the Treaty of 1850. In so doing, the Circuit Court suggested legislative action to resolve the appealing situation presented by petitioner's case. Before resort be had to legislative action, the issues herein presented should be resolved by the Supreme Court.

Historical Background

In 1804 Madison expressed the view that neutral aliens could "never be rightfully forced into military service particularly external service" and that they were protected therefrom by the law of nations (4 *Moore International Law Digest* 52). In 1862, Secretary of State Seward wrote that "there is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service" (4 *Moore, supra*, p. 53). He also asserted "I can hardly suppose that there exists anywhere in the world, the erroneous belief that aliens are liable here to military service" (4 *Moore, supra*, pp. 52-53). Nevertheless, the Civil War Act of March 3, 1863 (12 Stat. 731) subjected to military service "persons of foreign birth who shall have declared on oath their intention to become citizens." Diplomatic protests followed on the ground that compulsory military service of foreign nationals would violate home laws and the law of nations. As a result by proclamation, declarant aliens were given the right to withdraw their declaration but were required to leave the country within sixty-five days (May 8, 1863, 13 Stat. 732). In 1880 when American na-

tionals were impressed into military service by Mexico, Secretary of State Blaine asserted that compulsory draft of neutrals was a violation of international law (4 *Moore, supra*, p. 61). The Act of April 22, 1898 (30 Stat. 361, c. 187) included declarant aliens. On September 26, 1917, Secretary of State Lansing admitted the existence of the principle of international law preventing the compulsory drafting of neutral aliens except if the Nation is called upon to resist an invasion. (Hearings before the House Committee on Military Affairs, 65th Cong., 1st Sess. 1917, pp. 4, 10 (S. J. Res. 84)).

The Selective Service Act as originally enacted during the first World War again included all declarant aliens (Act of May 18, 1917, 40 Stat. 76, sec. 2). "Almost at the very beginning, the neutral nations' diplomatic representatives approached the State Department with numerous requests to relieve their nationals from the operation of the law, and many protests were filed against the induction of individual aliens into the military service, as being in violation of international law and treaty obligations." (Second Report of the Provost Marshal General (1919) p. 98. See also III *Hackworth, Digest of International Law* (1942) 603 *et seq.*). The law was amended to provide for a claim of exemption by declarant aliens upon withdrawal of their declarations of intention which would operate to forever bar them from becoming American citizens (Act of July 9, 1918, 40 Stat. 845, 885).

Several attempts were made in Congress to make the provisions in regard to declarant aliens applicable to non-declarant aliens but none were successful. (See *Tutun* v. *U. S.*, 12 F. (2d) 763, 764 (C. C. A. 1st, 1926)). In 1931 the statute was modified by permitting the naturalization of any neutral alien whose withdrawal of the declaration of intention, application for discharge, and discharge occurred

after November 11, 1918 (46 Stat. 1087). These statutes were repealed by the Nationality Act of 1940 (8 U. S. C. A. 904). It has been held that this repeal operated to restore the right to apply for naturalization to those previously debarred from naturalization as neutral aliens who had claimed exemption during World War I. (*Interpretation 1 of the Immigration Service*, June 5, 1941; *In re Carlson* 730-P 259786 (D. C. Ill. 1942); *Petition of Otness*, 49 F. Supp. 220 (N. D. Calif. 1943); *Contra, In re Urmenta*, 42 F. Supp. 138 (D. C. Wisc. 1941)). On September 16, 1940, when the present Selective Training and Service Act was passed, only declarant aliens were again subjected to induction (54 Stat. 884). On October 11, 1940, Attorney General Jackson ruled that under the Selective Service Act, every alien between 21 and 36 who lives or has a place of residence, temporary or otherwise, was required to register under the Act.[2] Diplomatic protests including those from Switzerland as indicated *supra* were again received based on treaty provisions and principles of international law. (Senate Report 394, 77th Congress, 1st Sess.) As Secretary of State Cordell Hull advised, one country indicated that under its laws its nationals are prohibited from serving in the armies of a foreign state and on numerous occasions in the past the United States had objected to the compulsory military service of its nationals in the armed services of foreign states even in the absence of treaty provisions. (Letter to Senator Reynolds, Chairman Committee on Military affairs, May 23, 1941).

Section 3(a) of the Selective Service Act was thereafter amended on December 20, 1941 (55 Stat. 844) to set forth the provision noted above at p. 3.

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[2] This interpretation has been rejected in *Kristensen* v. *McGrath*, 179 Fed. 2nd 796 (C.C.A. D.C. 1950), certiorari granted May 5, 1950.

In connection with this bar of citizenship contained in our Selective Service Acts, our Government, either by statute or regulation, took great pains to eliminate any possibility of misunderstanding, by requiring, in effect, a voluntary act of citizenship renunciation on the part of the alien claiming exemption. Thus, under the 1917 Act, which applied only to declarants, the overt act of surrendering the declaration of intention, in exchange for the exemption, was required. Under regulations supplementing the 1940 Draft Act, an express waiver in writing was required of every "neutral" alien, as distinguished from a "treaty" alien. The petitioner Moser was deprived of this protection against a misunderstanding when the State Department and the Selective Service System, together with the Swiss Legation, collaborated in order to achieve revision of the application for draft exemption (Form 301) so as to expressly delete therefrom the waiver of citizenship.

I

The Circuit Court Erred in Finding That the Selective Training and Service Act Controlled Petitioner's Status and Did Not Conflict With the Swiss Treaty.

The Swiss Treaty of 1850 granted draft exemption to its nationals without imposing the permanent bar "from becoming a citizen of the United States."

In *Hauenstein* v. *Lynham*, 100 U. S. 483 (1879) the Supreme Court recognized that this treaty was self effectuating and had become the law of the land. The Selective Training and Service Act of 1940 authorized relief from military service under the Act with the proviso that the applicant would incur a forfeiture of the privilege to become an American Citizen. The imposition of this condition from which the beneficiaries of the Treaty were

free, if applied to a Swiss national was inconsistent with the provisions of our 1850 agreement with Switzerland. Obviously, the Selective Service Act added a condition, which did not heretofore exist, to the terms of the Treaty.

It remains to ascertain whether the conditions of the Selective Service Act abrogated the Treaty. The court below assumed that if a conflict existed the Treaty was *pro tanto* superseded.

When the Selective Service Act of 1917 (50 U.S.C.A. 226) containing a similar provision barring neutral aliens from citizenship was enacted, as the Circuit Court noted, "no one apparently thought such a treaty as this would be affected by the law as passed. See 56 Cong. Rec. 8415-19, 8485." When the 1940 Act became law, our State Department officials asserted that "it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty". (Appendix B). Similarly, the Department of Justice ruled that "nationals of Switzerland were and are now entitled to claim exemption from military service on the basis of the Swiss Treaty" (*Matter of Hans Lowe,* A-5878178, July 14, 1947). This administrative construction of the Selective Training and Service Act of 1940 and the Swiss Treaty is entitled to great weight.

Norwegian Nitrogen Co. v. *U. S.*, 228 U. S. 294, 315 (1933);

United States v. *American Trucking Association,* 310 U. S. 534, 549 (1940);

Billings v. *Truesdell,* 321 U. S. 542, 552 (1944).

Thus, insofar as Congress and our administrative officials were concerned, it was not intended to abrogate, modify or suspend the right of Swiss nationals to claim draft

exemption under the 1850 Treaty. Under these circumstances and in the absence of a clear expression by Congress that the Swiss Treaty was to be modified or suspended, it should not be concluded that the Selective Service Act of 1940 although inconsistent, had such effect.

In *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336, it was said:

> "That Act must be construed with the view to preserve treaty rights unless clearly annulled. . . ."

And in 2 *Hyde, International Law*, 1464, *et seq.*:

> "It should be observed that the Supreme Court is wisely reluctant to construe an Act of Congress as in violation of an existing treaty . . . There appears to be no disposition to impute to it a readiness to disregard the terms of the international agreements of the United States."
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> "An intention to violate a treaty or to direct an act which would be a breach of national good faith is not to be imputed to Congress. While Congress has the power to violate treaties, it is obviously not to be assumed that Congress intends to exercise such a power unless its intention is unequivocally expressed." V Hackworth Dig. Sec. 489.

It is therefore submitted (1) that Section 3-a of the Selective Training and Service Act of 1940 if applied to a Swiss national was inconsistent with the Swiss Treaty of 1850 and (2) that the former did not supersede the Treaty because of the lack of an unequivocal expression by Congress to effect such an abrogation. And if the Treaty remained in full force and effect as contended, petitioner could claim exemption under the Treaty without forfeiting the privilege of becoming an American citizen.

II

The Circuit Court Erred in Finding That Petitioner Incurred the Penalty of Permanent Exclusion from American Citizenship under the Selective Training and Service Act of 1940.

(A) *The Selective Service Penalty Was Not Incurred.*

The Selective Training and Service Act of 1940 as amended (50 App. U. S. C. 303a) specifically renders ineligible to naturalization "those relieved from liability under this Act." Accordingly, there is necessarily implicit in the decision below the finding that petitioner obtained exemption under the Selective Training and Service Act of 1940. Nevertheless, the record is clear, that petitioner sought exemption solely under the Swiss Treaty of 1850. (Exhibits 8, 9, 10, pp. 34-39.) Indeed, the court below recognized the procedure which petitioner followed for it stated (R. 92):

> "The appellee, however, attempted to obtain his exemption *not under the above statute* but under the treaty and he did so because he wished to become an American citizen as well as to get exemption. Indeed, we should recognize that his desire to become an American citizen was paramount in his mind, for the court below has found, because it believed appellee when he so testified, that he would not have sought exemption had he known that it would deprive him of naturalization rights." (Italics supplied.)

The Swiss Legation asserted that the Treaty of 1850 granted unconditional draft exemption without the penalty of forfeiture of naturalization (Appendix A) and Treaty rights are to be liberally construed (*Chew Heong* v. *United States*, 112 U. S. 536). The State Department asserted that it was not the intention of the United States to deny any

rights conferred by the Treaty (Appendix B). The Selective Service System recognized petitioner's claim for exemption as a "treaty" alien, rather than a "neutral" alien and expressly revised its form (D. S. S. 301) to effectuate the same. The Circuit Court found no treaty violation in the Selective Service Act of 1940 but nevertheless found that a Swiss alien could not assert draft exemption under the treaty without incurring the penalty of the Selective Service Act. Two situations suggest themselves under the facts here presented:

(a) If the additional penalty provisions of the Selective Training and Service Act did not apply to Swiss nationals because the Treaty remained paramount as contended in Point I, then such nationals might claim exemption solely under the Treaty. By its very language the citizenship bar of the Selective Training and Service Act attached only to those relieved under the Act. If the Treaty continued in force without modification, petitioner was relieved not under the Act but solely under the Treaty. He therefore remained eligible for citizenship and the District Court's decision should be affirmed.

(b) If the penalty provisions of the Selective Training and Service Act applied to Swiss nationals claiming draft exemption under the 1850 Treaty either because (1) the Act was not inconsistent or (2) the Act was inconsistent but superseded the Treaty, then it is clear that petitioner mistakenly attempted to perform an act which was impossible as a matter of law, i.e. to seek draft exemption under the Treaty without incurring the penalty of the Act. And petitioner's mistake was encouraged, known and induced by the Department of State and the Selective Service System. For as the District Court found (R. 85):

> "Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser

had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed revised form D.S.S. 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the Swiss Treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940 I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted."

Petitioner's request to his draft board was for "unconditional relief" from military service in conformity with the Treaty and with reference to the Secretary of State's note of July 6, 1942 (R. 36-38, Appendix B). It was so recognized by the Selective Service System. This was, as the District and Circuit Court found, a request to be relieved solely under the Treaty. (R. 85, 92.) Petitioner therefore sought specifically not to be relieved under the Selective Training and Service Act. But, according to the Circuit Court the very relief under the Act which he disclaimed, was accorded to him.

The general rules of law and statutory construction should be applied herein. The strict letter of the statute must yield to avoid captious interpretations, *Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947), and to avoid injustice. *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457 (1891). Where as here a penalty is imposed, the statute should be liberally construed to avoid the imposition of the penalty. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6 (1948). An exemption claim filed as here under a mistake known to, shared and induced by the Department of State and the Selective

Service System—agencies upon whom one would naturally rely for advice upon treaty rights and draft exemption claims—should not carry with it the penalty of exclusion from American citizenship.

Mistake may be asserted in transactions between individuals and the government. *Williams* v. *United States*, 138 U. S. 514, 517 (1890). Mistake is a well known legal concept which justifies relief in contracts (V *Williston and Thompson on Contracts*, p. 4399), real estate transactions (*Williams* v. *U. S., Supra*) wills (3 *Pomeroy Equity Jurisprudence*, 1941, p. 405) and in the law of marriage and divorce (3 *Nelson, Divorce and Annulment*, 1945, p. 316). That mistake may avoid a claim of draft exemption as in the case of one unable to read English has been recognized by the Department of Justice (*Matter of Lope Hormazabel* A 5725997. See also: *Neutral Alien Who Claimed Exemption from Military Service, Monthly Review, Immigration Service*, November 1947, pp. 56, 59).

It is true that normally mistake of law will not permit the avoidance of an obligation. But where as here, the mistake of law was induced and shared by one to whom the mistaken party would normally look to for guidance as to the law, the courts will grant relief.

Thus, in *Staten Island Hygenia Ice and Cold Storage Co.* v. *U. S.*, 85 F. (2d) 68 (C. C. A. 2, 1936) it was held that a cause of action for rescission of a tax compromise was stated where it was alleged that a mistake of law was induced by a United States tax collector. The court said at page 71:

> "Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant . . .

It should make no difference that the United States is the party against whom rescission is sought."

See also: V *Williston and Thompson, supra*, p. 4439.

Here, petitioner acted upon the advice extended to him by our State Department through the Swiss Legation that his treaty rights remained in full force. He was thereby led to believe that he could claim exemption under the treaty and not incur the Selective Service Act penalty. His claim for draft exemption was for unconditional release in conformity with the treaty. His mistake—if the Circuit Court's conclusion be accepted that draft exemption could not be claimed unconditionally, *i. e.*, without the citizenship bar—was one known and induced by our government. If petitioner's draft exemption claim as asserted without a bar to citizenship was impossible as a matter of law, the request should not have been accepted in part but should have been rejected. And the petitioner should have been informed that the only way he could achieve exemption was by signing the regular exemption Form 301, containing the express waiver of citizenship. The petitioner would thus have had the power of election either to waive citizenship or serve in the Armed Forces. Now, to place him in the same position as if he had signed the regular waiver of citizenship would be highly inequitable. The mistake of petitioner in filing such a claim and the mistake of the government in honoring the claim should be relieved as a matter of equity. Under these circumstances a penalty of a permanent bar to citizenship should not be imposed and the District Court's conclusion should be affirmed.

(B) *The Selective Service Penalty Is No Longer Operative.*

By virtue of Section 16 of the Selective Service Act (P.L. 473, approved June 29, 1948), Section 3(a) of the Selective Training and Service Act of 1940 became inopera-

tive on March 31, 1947. The Immigration Service realized that a serious question was thus raised as to whether the naturalization bar remained. It consulted the Assistant Solicitor General who ruled on August 13, 1947, that:

> "An alien who obtained an exemption from military service under this section was assumed to have rendered himself ineligible for naturalization until such time as the courts have passed upon the question." *Monthly Review, Immigration and Naturalization Service,* November, 1945, p. 56, Note 1.

Repeal of the naturalization bar after World War I operated to restore the right to apply for naturalization to those previously barred from naturalization as neutral aliens.

Interpretation 1 of the Immigration Service, June 5, 1941
In re Carlson, 730-P 2 59687 (D. C. Ill. 1942)
Petition of Otness, 49 F. Supp. 220 (N. D. Calif. 1943)
Contra: In re Urmenta, 42 F. Supp. 138 (D.C. Wisc. 1941).

It is a commonplace of Anglo-American law that repeal of a statute eradicates it altogether, and the situation is as if it had never existed. 59 *Corpus Juris* 1189, 1190. Expiration of a statute is in this respect the same as repeal.

U. S. v. *Boisdore,* 8 How. 113;
The Irresistible, 7 Wheat. 551.

Congress, in terminating the Selective Training and Service Act of 1940 was explicit and specific. It directed that the entire Act, with exceptions not here pertinent "*shall become inoperative and cease to apply*" at 12 o'clock noon on March 31, 1947, "except as to offenses committed prior to such Act." (Section 316, 50 U.S.C. App., enacted June 29,

1946). Thus there can be no dispute but that Section 3(a) of the Act died on March 31, 1947, without exceptions or savings clause.

In addition, the termination provisions themselves are expressly preserved, including the phrase "offenses committed prior to such date" (March 31, 1947). This clearly refers only to prosecutions under Section 11.

It seems clear that Congress intended thereby to terminate *all* of the provisions of this section, including those creating the disability for United States citizenship.

It is an elementary canon of statutory construction that the grant of one express power or function is also necessarily the implicit exclusion of all others. *"Expressio unius est exclusio alterius."*

Express enumeration, therefore, of the exceptions and preserved functions contained in Section 16 of the Act, terminating all functions except those enumerated, must necessarily be construed to mean that the citizenship disability created by Section 3(a) was not intended to be preserved.

At common law, the unqualified repeal or termination of a statute, without a saving clause, destroyed all rights and liabilities dependent upon it.

United States v. *Reisinger*, 128 U. S. 398;
Duke Power Co. v. *S. C. Tax Comm.* (C. C. A. 4, 1936), 81 F. (2d) 513, Cert. Denied 298 U. S. 669.

Statutes which have been enacted in derogation of the common law to prevent criminal prosecutions under the dying statute from being terminated, and to continue in existence criminal penalties, criminal liabilities and criminal forfeitures imposed under the erstwhile statute (*United States* v. *Reisinger, supra*), have been strictly construed [*U. S.* v. *Hark*, 320 U. S. 531 (1944).] To date, there has been no judicial extension of their doctrine to situations involving the political status and citizenship rights of individuals.

In *Ewell* v. *Daggs*, 108 U. S. 143, the Supreme Court held that after the repeal of a usury statute, a usurious rate of interest, forfeited under the statute while in force, was reinstated, the interest was payable, and no forfeiture could be enforced. For the life of the statute, the interest rate on the contract constituted a basis for forfeiture of the entire amount of the interest. At the statute's death, the disability fell.

A ruling contrary to the position taken here, rendered in *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. C. A. 2, 1958; cert. denied 335 U. S. 886) can not be regarded as a precedent. As the Solicitor General's memorandum in the Supreme Court will disclose (No. 317, Oct. Term, 1948) the cause was rendered moot prior to decision in the District Court. The *Benzian* opinion is therefore not persuasive as a precedent. *Leader* v. *Apex Hosiery*, 108 F. (2d) 71, 81, affirmed, 310 U. S. 469.

The passage of Section 3(a) of the Selective Service Act created a new class of aliens ineligible for naturalization—*i.e.*, those neutral aliens who claimed draft exemption. But the termination of the Selective Service Act, without a saving clause expressly preserving that ineligibility, dissolved the newly-created class of ineligibles. The Act created a bar to citizenship, but removed the bar upon its own termination.

Conclusion

We believe that the decision of the Circuit Court reversing the District Court was erroneous and that for the reasons set forth herein, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

JACK WASSERMAN,
Warner Bldg.,
Washington 4, D. C.

MORRIS E. VOGEL,
Of Counsel.

APPENDIX A

Legation of Switzerland
Washington, D. C.

ad N.2.5.

June 5, 1942.

The Honorable Cordell Hull, Secretary of State, Washington, D. C.

SIR:

On November 25, 1850, the United States and Switzerland concluded a Treaty of Friendship and Commerce which ever since has governed the establishment and the treatment of citizens of the two countries living in the other. In Article II of this Treaty, the contracting parties agreed that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service."

Animated by the desire of regulating the military obligation of certain individuals possessing both the American and the Swiss nationality, the two Governments complemented the aforementioned Treaty with the signing on November 11, 1937, of a Convention, concerning the military obligations of certain persons having dual nationality. According to this convention, a person born in the territory of one of the two Parties, of parents of the other, who possesses the nationality of the two countries and has his habitual residence in the State of his birth, shall not be held liable by the other State for military service in case of a temporary stay in the territory of the latter.

By signing the Treaty of 1850, and the Convention of 1937, the Governments of the United States and of Switzerland have recognized the existence in their respective territories of colonies of nationals of the other Party, and they have allowed them to maintain all lawful ties with the homeland. These nationals who have retained their original citizenship, and who by *not* applying for naturalization have clearly demonstrated their intention of remaining citizens of their Mother country, should,

therefore, not only by generally recognized International Law, but also by Treaty, be exempt from any personal military service in the armed forces of the country of their residence.

Switzerland's policy has always been in complete agreement with said principle and the treaties. Although since 1850, the Swiss Government has been forced on several occasions by international circumstances to call up for total military mobilization the full man-power of the country, representing one eighth of the entire population, no American citizen had ever been enrolled for military service during these emergencies. This was in strict observance of the military exemption clause of the Treaty of 1850, and in recognition of the rights and duties of neutral persons under International Law.

With the Act of December 20, 1941, to amend the Selective Training and Service Act of 1940, by providing for an extension of liability for military service, the Selective Service has been empowered to enforce liability for military service upon any alien of a certain age who is a resident of the United States, irrespectively of the fact whether or not he has declared his intention to become an American citizen. The new Act provides that every male person residing in the United States between the ages of 20 and 45 shall be liable for training and service in the land and naval forces of the United States.

The enactment of this new law is evidently a departure of the United States from the general rule to conscribe for military service only "citizens of the respective country" and does not seem to be in harmony with the international usage, according to which no neutral shall be compelled to serve in the armed forces of a belligerent country. The Swiss Government esteems, therefore, that the application of the Selective Service and Training Act as amended to Swiss citizens is not reconcilable with the Treaty of 1850.

It is true that the new Selective Service Law provides for the possibility that a neutral alien may be released from all military obligations if prior to his induction in the armed forces of the United States, he has made application to be relieved from such liability, with the consequence,

however, that any person who makes such an application shall thereafter be debarred from becoming a citizen of the United States. This provision, offering a possibility of exemption to a Swiss resident, may in many cases result in a practical solution, but on account of the accompanying consequences it cannot bring the Act in harmony with the Treaty of 1850, which mentions no conditions whatsoever for the exemption from military service. Under the new Act, Swiss citizens would be allowed to enjoy the privileges established by the Treaty solely if they fulfill a material condition not mentioned and not understood in the Treaty.

The text of the Treaty of 1850 furthermore makes no discrimination between persons residing temporarily in the territory of the other party and those who are established permanently there. By inserting the military clause, the two contracting parties had the intention to exempt all their nationals from service in the armed forces of the other party. Under the terms of the Selective Training and Service Act of 1940, as amended, however, only those Swiss citizens who have been declared as "non-resident" in the United States have an opportunity to be unconditionally relieved from military service, while all those considered as residing permanently in the United States could not be exempt without at the same time being debarred from becoming an American citizen. This procedure would indeed place Swiss nationals in a less favorable position than even enemy aliens in the United States, who, if considered by the military authorities as not acceptable for military service or upon their own request, can be exempt from military duties without any further consequences.

I further beg to bring to your attention the situation of a number of Swiss citizens who were inducted into the American Army before the regulations providing for an exemption from service have been in force. Inasmuch as the new Act provides a possibility for exemption only if application is made prior to induction, these Swiss citizens do not have an opportunity to be relieved from military service. They are put in an extremely precarious situation as the Swiss military penal code of June 13, 1927, prohibits

under severe penalties any Swiss citizen to enter the armed forces of a foreign country.

In the light of the foregoing, conscription of Swiss citizens in the United States who have not declared their intention of becoming American citizens, contradicts the text and the spirit of the Treaty of 1850, as well as the principles governing the rights and duties of neutrals under international law.

I have been, therefore, instructed by my Government to approach your Excellency and to request from you to intervene with the appropriate authorities, in order that at least the Swiss citizens who have not declared their intention to become American citizens may be unconditionally exempted from the liability for military service.

Accept, Sir, the assurances of my highest consideration.

(Sig.) C. BRUGGMANN.

R/H.

APPENDIX B

SIR:

I have the honor to refer to your note ad N.2.5. of June 5, 1942 concerning the liability of Swiss nationals for military service in the United States.

The note calls attention to Article II of the Convention of Friendship, Commerce and Extradition between the United States and Switzerland, concluded on November 25, 1850, under which "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service", and to the Convention Regulating Military Obligations of Certain Persons Having Dual Nationality signed at Bern on November 11, 1937; and the view is expressed that under these conventions Swiss nationals in the United States are unconditionally relieved from military service.

I have taken note of your objection to the provisions of the Selective Service Act regarding the right of neutral aliens to obtain exemption by forfeiting their right thereafter to become American citizens.

All male persons within certain specified ages "residing in the United States", unless otherwise exempted, are required by Section 2 of the Selective Training and Service Act of 1940 to register and are made liable for military service by Section 3(a) of the Act:

Swiss nationals temporarily in the United States are not considered to be "residing in the United States" within the meaning of that term as used in the Selective Training and Service Act of 1940 and therefore are not required to register or to render military service under that Act. It is, however, incumbent upon those persons whose departure from the United States is to take place more than three months after their entry to make application within such period of three months to the Local Draft Board in the place in which they are staying for a determination of their residence status. When such determination establishes that they are here temporarily, they are issued a certificate of non-residence which, during the period of its validity, exempts them from registration and military service. Such certificates are renewable upon application. Swiss nationals temporarily in the United States who have registered for military service in error may have such registration canceled by following the procedure for determination of residence.

In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above whether such requests be made by the nationals themselves or by you in their behalf.

Accept, Sir, the renewed assurances of my highest consideration.

For the Secretary of State:

July 6, 1942.

A. A. Berle, Jr.

APPENDIX C

In a letter dated Nov. 18, 1949, the Swiss Legation, writing to Hans Thummel, one of its Nationals, sets forth some of the facts which explain why it advised its subjects to execute DSS Form 301, revised, as follows:

"The Legation had the opportunity to discuss with the competent United States authorities the various problems pertaining to the procedure to be followed by Swiss nationals in obtaining exemption from military service in this country. It was the purpose of these exchanges of views to ascertain whether the existing procedure could be modified, in order to bring it in complete harmony with the text and intent of article 2 of the Treaty . . . The Legation always maintained the point of view that the exemption of Swiss nationals from military service in the United States, pursuant to the provisions of the treaty, be unconditional, i. e. that the Swiss citizens shall be allowed to enjoy the privileges established by the Treaty without being compelled to fulfill material conditions not covered by the Treaty. Therefore, the Legation considered the requirement of signing a 'waiver of the right to apply for naturalization' when applying for exemption from military service, as a condition contrary to the Treaty of 1850.

• • • • • • • •

"However, the Department of State assured the Swiss Government that it is not the intention of the United States Government to deny to Swiss nationals any rights or privileges conferred on them by Treaty.

"In lengthy conversations the Legation, the State Department and the Selective Service System endeavored to work out a procedure for the exemption of non-declarant Swiss nationals which would be in conformity with the laws and the provisions of the Treaty of 1850. Finally, the following procedure to be followed by Swiss in obtaining exemption was established:

1. The Legation formally requested the exemption . . . The individual requests made by the Legation

on behalf of Swiss nationals was based on article 2 of the Treaty of 1850.

2. The text of Form DSS-301 was expressly modified and was understood not to contain any waiver of the right to apply for naturalization . . .

3. The State Department was of the opinion that the applicant by filing the revised DSS Form 301 did neither waive nor forfeit his rights to apply for naturalization . . ."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 301

PAUL MOSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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PAUL MOSER,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The Court of Appeals opinion is reported in 182 F. (2d) 734 and is set forth at page 61 of the Record. The District Court opinion is reported at 85 F. Supp. 683 (R. 56).

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). Certiorari was granted on January 2, 1951.

Questions Presented

1. Whether the Treaty of Friendship and Commerce between the United States and the Swiss Confederation concluded November 25, 1850 exempting the nationals of each country residing in the other from personal military service granted unqualified relief from such military service without the disability of permanent ineligibility for American citizenship.

2. Whether the provisions of the Selective Training and Service Act of 1940 (50 Appendix U. S. C. 303a) authorizing neutral aliens to claim exemption under the Act upon condition that such exemption claim shall operate as a bar to American citizenship superseded or modified the aforesaid treaty.

3. Whether an exemption claim by a neutral Swiss alien asserted under the aforesaid treaty and not under the Selective Training and Service Act incurs the citizenship ban of the Selective Training and Service Act which by its express terms was applicable only to those "relieved from liability for training and service under this act."

4. Whether or not the petitioner, in claiming the aforesaid exemption, is debarred from citizenship as a matter of law, where the exemption was not obtained by him as a neutral alien, in the manner prescribed in the Selective Service Regulations, but rather was obtained for him as a Treaty alien pursuant to the Swiss Treaty of 1850, in accordance with a special procedure agreed upon between our own State Department, the Selective Service System and the Swiss Legation.

5. Whether in any event, on the facts here shown, the Government is estopped from enforcing the provisions of 50 U. S. C. App. 303a in this instance, particularly when it expressly revised the application for exemption (Form

301) and relieved petitioner from formally and affirmatively acknowledging, in writing, that he understood his application would bar him from citizenship.

6. Whether the citizenship ban of the Selective Training and Service Act of 1940 expired when the applicable provision of the said Act (50 Appendix U. S. C. 303a) were no longer operative.

Statutes and Treaties

Article II of the Convention of Friendship, Commerce, Extradition, etc., between the United States of America and the Swiss Confederation, concluded November 25, 1850, and proclaimed November 9, 1855, reads as follows: (11 Stat. 587; Malloy's Treaties and Conventions Vol. 2, p. 1763).

"Article II

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required by way of compensation, from citizens of the country where they reside, who are exempt from the said service."

Section 303(a) of Title 50, Appendix, United States Code, pertaining to exemption of neutral aliens from military service, reads in part as follows:

> "Persons liable for training and service; number; term; status after completion of term; pay; allowances; and benefits; place of employment
>
> (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in

the land or naval forces of the United States; Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . ."

Section 316(a) and (b) of Title 50, Appendix, United States Code, relating to the suspension of laws conflicting with the Selective Training and Service Act of 1940, and the expiration of the Act reads as follows:

"Suspension of conflicting laws; expiration of Act; appropriations.

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) The provisions of the third sentence of section 3(a) of this Act (section 303(a) of this Appendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act (sections 301-303, 304, 305, 306-309, 310, and 311-318 of this Appendix), except the provisions of section 3(b), 3(c), 3(d), 8, and 16(b) (sections 303(b), 303(c), 303(d), 308, and 316(b) of this Appendix), and the fourth and fifth provisos of the second sentence of section 3(a) (Section 303(a) of this Appendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date." . . .

Statement

Petitioner is a native and citizen of Switzerland, married to an American citizen and the father of three American

born children. (R. 7-9.) He entered the United States in 1937, filed a declaration of intention in 1938 and then left the United States on May 11, 1940 to join the Swiss Army. (R. 7-9, 49). Upon his return to the United States in October, 1940, he was compelled to enter on a new immigration quota and he was advised that his declaration of intention was no longer valid (R. 46, 53). A petition for naturalization filed in 1942 was subsequently dismissed for failure to prosecute (R. 51.). In 1944 petitioner claimed exemption from military service on the basis of a treaty concluded between the United States and Switzerland in 1850. Upon a new petition for naturalization filed in 1948, petitioner was granted naturalization on July 21, 1949 which decree was reversed by the Circuit Court of Appeals. (R. 2, 67). From such reversal, application was made for certiorari which was granted by this court.

On November 25, 1850 the United States and Switzerland executed a Treaty granting the nationals of each country "residing or established in the other," unqualified exemption from military service (11 Stat. 587). The history of the treaty reveals that it was clearly understood that the quoted language was intended to cover aliens who did more than sojourn temporarily in the countries of the contracting parties. Those who acquired a fixed domicile were encompassed within this language. (5 *Miller, Treaties and other International Acts of the United States of America*, 867). Article 94 of the Swiss Military Penal Code provides that Swiss citizens who enter a foreign army are liable to criminal penalties.[1] The Selective Training and Service

[1] Article 94 of the Swiss Military Criminal Code of June 13, 1927 (Nouveau Manuel du droit Suisse, 2 vols., Zurich, 1946-47, vol. 2, p. 632) reads:

"Any citizen who, without the permission of the Federal Council enters foreign military service shall be punished by imprisonment."

(See also: *House Report 1991*, 81st Congress).

The records of our State Department will show that one, Peter Good (Gut) was recently sent to prison by the Government of Switzerland because he served in the United States Armed Forces during the War.

Act of 1940 as amended (50 U. S. C. App. 303a) granted exemption under the Act from military service to nationals of neutral countries but such exemption claim operates as a bar to American citizenship [50 U. S. C. App. 303(a)].

On June 5, 1942, the Legation of Switzerland addressed a formal complaint to the Secretary of State (Appendix A, herein) asserting that the Selective Service Act of 1940 was "not reconcilable with the Treaty of 1850". It was alleged:

> "The enactment of this new law is evidently a departure of the United States from the general rule to conscribe for military service only 'citizens of the respective country' and does not seem to be in harmony with the international usage, according to which no neutral shall be compelled to serve in the armed forces of a belligerent country. The Swiss Government esteems, therefore, that the application of the Selective Service and Training Act as amended to Swiss citizens is not reconcilable with the Treaty of 1850.
>
> "It is true that the new Selective Service Law provides for the possibility that a neutral alien may be released from all military obligations if prior to his induction in the armed forces of the United States, he has made application to be relieved from such liability, with the consequence, however, that any person who makes such an application shall thereafter be debarred from becoming a citizen of the United States. This provision, offering a possibility of exemption to a Swiss resident, may in many cases result in a practical solution, but on account of the accompanying consequences it cannot bring the Act in harmony with the Treaty of 1850, which mentions no conditions whatsoever for the exemption from military service. Under the new Act, Swiss citizens would be allowed to enjoy the privileges established by the Treaty solely if they fulfill a material condition not mentioned and not understood in the Treaty."

On July 6, 1942, the Secretary of State (See Appendix B herein) replied:

> "In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above whether such requests be made by the nationals themselves or by you in their behalf."

Thereafter, the Swiss Legation informed its nationals of the procedure to be followed in claiming exemption under the Treaty of 1850 (Appendix C and D herein), advising them that under the Treaty a claim of draft exemption would not result in a forfeiture of the right to American citizenship. (R. pp. 52, 54, 57).

The form of application for draft exemption was revised and the treaty alien was no longer required to acknowledge above his signature that he understood the exemption claim would bar him from citizenship. (Exhibit 1 and 1-A; R. 14-16). A procedure was also adopted for treaty aliens "whereby the Embassy or Legation of the country of which an alien was a national would transmit to the (State) Department an application for the alien's exemption on the basis of the treaty with that country. *If the Department was satisfied that the treaty was applicable* and approved the application, it would transmit such application to National Selective Service Headquarters with the statement that it had been approved." (Appendix D).

The National Director of the Selective Service System now asserts that the revised form was to be utilized by all neutral aliens. (Appendix H). However, instructions in 1943 from National Headquarters, to the State and City Directors of the Selective Service System in New York, where the petitioner resided, were explicit that only treaty aliens could execute the revised draft exemption application. (Appendix E.) And in 1943 the New York City Selec-

tive Service System was aware of the fact that the Swiss Legation had advised its nationals that they would not be waiving their citizenship eligibility by claiming draft exemption. (Appendix F.) Moreover, these officials considered that the Swiss treaty alien had a "special status" and so advised the local draft boards. (Appendix G). Finally, the District Court found that not only the State Department but the Selective Service System as well, proceeded on the assumption that petitioner had immunity from military training under the treaty. (R. 59-60).

In accordance with the procedure agreed upon between the State Department, the Selective Service System and the Swiss Legation, there was made through the State Department, a claim for draft exemption under the Treaty of 1850 for petitioner, a Swiss citizen and army officer, who is married to a native American citizen with whom he has three American-born children (Exhibit 8, 9, 10, R. 29-31, 9). Petitioner executed a printed form for draft exemption which was specifically revised to omit the language contained in the regular forms with respect to the forfeiture of the right to apply for naturalization (Exhibit 1, R. 14-15; Exhibit 1-A, R. pp. 16-17).

The petitioner believed that he was claiming draft exemption under the Treaty of 1850 and not under the 1940 Selective Service Act (Exhibit 9, R. 30). He testified and the District and Circuit Courts found that he would not have claimed draft exemption if he knew that the United States would not recognize the treaty and if he were to be barred from naturalization (R. 53, 55, 60, 65).

On March 31, 1948 the petitioner applied for naturalization and on July 21, 1949 the District Court for the Eastern District of New York admitted him to citizenship (R. p. 4). In its opinion, 85 F. Supp. 683, the District Court held (R. 59-60):

> "Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed the revised form DSS 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the Swiss treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940, I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted."

On appeal, the Circuit Court reversed in an opinion (R. 61) which held (1) that the Selective Service Act of 1940 as amended was not inconsistent with the Treaty of 1850; (2) that if the Act was inconsistent, it superseded the treaty; and (3) that although petitioner attempted to claim exemption under the treaty rather than the statute, and although he waived no treaty rights, his exemption claim barred him from naturalization. The Circuit Court concluded that "this does seem, however, to be an appealing case for legislative action."

Historical Background

(A) *Prior to 1917*

In 1804 Madison expressed the view that neutral aliens could "never be rightfully forced into military service particularly external service" and that they were protected therefrom by the law of nations (4 *Moore International Law Digest* 52). In 1862, Secretary of State Seward wrote that "there is no principle more distinctly and clearly settled

in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service" (4 *Moore, supra,* p. 53). He also asserted "I can hardly suppose that there exists anywhere in the world, the erroneous belief that aliens are liable here to military service" (4 *Moore, supra,* pp. 52-53). Nevertheless, the Civil War Act of March 3, 1863 (12 Stat. 731) subjected to military service "persons of foreign birth who shall have declared on oath their intention to become citizens." Diplomatic protests followed on the ground that compulsory military service of foreign nationals would violate home laws and the law of nations. As a result by proclamation, declarant aliens were given the right to withdraw their declaration but were required to leave the country within sixty-five days (May 8, 1863, 13 Stat. 732). In 1880 when American nationals were impressed into military service by Mexico, Secretary of State Blaine asserted that compulsory draft of neutrals was a violation of international law (4 *Moore, supra,* p. 61). The Act of April 22, 1898 (30 Stat. 361, c. 187) included declarant aliens. On September 26, 1917, Secretary of State Lansing admitted the existence of the principle of international law preventing the compulsory drafting of neutral aliens except if the Nation is called upon to resist an invasion. (Hearings before the House Committee on Military Affairs, 65th Cong., 1st Sess. 1917, pp. 4, 10 (S. J. Res. 84)).

(B) *The 1917 Act*

The Selective Service Act as originally enacted during the first World War again included all declarant aliens (Act of May 18, 1917, 40 Stat. 76, sec. 2).[2] "Almost at the

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[2] It is said that approximately 40,000 protests were received. *Fitzhugh and Hyde, The Drafting of Neutral Aliens by the United States* (1942), 36 Am. J. Int. L. 369.

very beginning, the neutral nations' diplomatic representatives approached the State Department with numerous requests to relieve their nationals from the operation of the law, and many protests were filed against the induction of individual aliens into the military service, as being in violation of international law and treaty obligations."[3] (Second Report of the Provost Marshal General (1919) p. 98. See also III *Hackworth, Digest of International Law* (1942) 603 *et seq.*). Secretary of State Lansing testifying before the House Military Affairs Committee on S. J. Res. 84 (65th Cong. 1st Sess.) stated:

> "So far as the drafting of neutral aliens is concerned it would involve us in the greatest difficulties. It has never been done, to my knowledge, in this country; not even during the Civil War. Mr. Bayard states that very frankly in reviewing the question when we were protesting against an effort to compel some of our people, whom we claimed were citizens, to do service in foreign armies. We have had a great many controversies, particularly with Austria and Italy, in regard to the service of naturalized citizens of this country who are of Austrian or Italian origin, and who have returned to their country and been forced into the army to do military service, and we have always insisted that the Government had no right to compel such service. For over 100 years that has been the position of the Government of the United States.
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[3] "The American World War practice of conscripting resident declarants found the approval of a distinguished authority, but its validity has never been established by a decision of the Supreme Court. • • • Writers on international law mostly deny the lawfulness of subjecting nationals of a foreign country to military conscription." *Koessler, Rights and Duties of Declarant Aliens*, 91 U. of Pa. Law Rev. 321, 334, 335 (1942). See also: *Borchard, Diplomatic Protection of Citizens Abroad* (1915) 64-65; *Vattel, Law of Nations* (1859) 399; 1 *Oppenheim, International Law* (Lauterpacht's 5th Ed., 1937), 237, 238; *Cf.: Fitzhugh and Hyde, The Drafting of Neutral Aliens by the United States* (1942), 36 Am. J. Int. L. 369; 2 *Hyde, International Law* (1922), 244, 246, 247.

"We have, of course, several treaties that affect this question, and which would be substantially abrogated by this legislation if it was adopted; and, on the other hand, those countries with whom we have no specific treaty provisions feel as strongly as those with whom we have, and they have just as much right, although not a technical right, to claim on the general principle that their citizens should not be drafted in this country.

"Mr. Burnett. If you will pardon me, Mr. Secretary, that is the principle of international law, also, in regard to neutral aliens?

"Secretary Lansing. Yes.

"Mr. Burnett. Outside of any treaty regulations?

"Secretary Lansing. Yes; and outside of that, as a question of policy, I think it would be most unwise at the present time, when our relations with many neutrals are—I will not say precarious, but of an irritating character. It is even conceivable that it might result in driving some of them into the war against us, or at least taking a very hostile attitude toward us, which would be most unfortunate at this time."

The law was thereafter amended to provide for a claim of exemption by declarant aliens upon withdrawal of their declarations of intention which would operate to forever bar them from becoming American citizens (Act of July 9, 1918, 40 Stat. 845, 885). This amendment was not considered to be in conflict with treaty obligations. (56 Congressional Record 8414, 8415, 8485). Several attempts were made in Congress to make the provisions in regard to declarant aliens applicable to nondeclarant aliens but none were successful. (See *Tutun* v. *U. S.*, 12 F. (2d) 763, 764 (C. C. A. 1st, 1926)).

In 1919 Congressman Lufkin proposed H. R. 9416, a bill to provide for the deportation of neutral aliens who had claimed exemption from military service. (66th Congress, 1st Session). Secretary of State Lansing opposed this bill on the ground that "it may be looked upon by many foreign

governments, whose nationals might be affected thereby, as violative of provisions of treaties between the United States and those countries". (House Immigration Committee Hearings on H.R. 9416, Part 2, p. 25). In the same year, the Solicitor of the State Department Mr. Woolsey, testified in opposition to a similar bill, stating:

> "My own personal view is that it does not seem quite fair, in the act of July 9, 1918, to give these neutrals a right, allow them to exercise it freely, and then seemingly punish them for exercising that right.
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> In the State Department we were opposed to the last clause of the act of July 9, 1918, forever debarring a neutral who withdrew his declaration from becoming a citizen. We thought that it was an illustration of a wrong principal in public policy to have a class of aliens in this country who never could become citizens.
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> Now, if there is a treaty exemption from military service, a foreign government might say, 'Our citizens are exempted from military service in the United States on account of the treaty. But you have added a discriminatory penalty to that exemption by requiring that our citizens who refused to enter the military service must leave the country.' " (House Immigration Committee Hearings on H.R. 10010, 66th Congress, 1st Session, pp. 63, 65, 70).

In the judicial decisions which arose immediately subsequent to the 1917 Act, it was generally considered, despite the Congressional intention to the contrary noted above, that the Selective Service Act abrogated treaty provisions. The clearest expression of this view is contained in *Ex parte Larrucea,* 279 Fed. 981 where the court stated:

"The particular claim is made by the petitioners that the language of section 2, to the effect that the draft 'shall be based upon *liability to military service*' is conclusive of an intent upon the part of Congress in the passage of this act to exclude from the operation those who were not liable to military service because of some treaty provision. It is perhaps difficult to appreciate just exactly what Congress had in mind in the use of the phrase 'liability to military service, there being no general law to which my attention has been called definitely establishing and fixing 'liability to military service' under the laws of the United States.

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* * * "however, the act does provide in express terms that the draft shall be based upon liability to military service of all male citizens and all male persons not alien enemies who have *declared* their intention to become citizens, and as above recited contains the further provision that of all persons registered none shall be exempt from service, unless exempt or excused 'as in the act provided'. The language seems indicative of such a 'positive repugnancy' (Chew Heong v. United States, 112 U. S. 536, 549, 5 Sup. Ct. 255, 28 L. Ed. 770) to the terms of the treaty with Spain as to leave no room for the conclusion that they can be read together, and that Congress was intending that citizens of Spain, as well as of other countries, who had declared their intention of becoming citizens of the United States under the naturalization laws, should be subject to the demands of the emergency. The conclusion here announced is confirmed in a degree by the concluding section of the act, suspending all laws in conflict with it during the period of emergency."

A similar conclusion was reached in a *dicta* with regard to the treaty with Switzerland. (*In re Trachsel*, 271 Fed. 779).

In 1931 the 1917 statute was modified by permitting the naturalization of any neutral alien whose withdrawal of the declaration of intention, application for discharge, and discharge occurred after November 11, 1918 (46 Stat. 1931). These statutes were repealed by the Nationality Act of 1940 (8 U. S. C. A. 904). It has been held that this repeal operated to restore the right to apply for naturalization to those previously debarred from naturalization as neutral aliens who had claimed exemption during World War I. (*Interpretation 1 of the Immigration Service*, June 5, 1941; *In re Carlson* 730-P 259786 (D. C. Ill. 1942); *Petition of Otness*, 49 F. Supp. 220 (N. D. Calif. 1943); *Contra, In re Urmenta*, 42 F. Supp. 138 (D. C. Wisc. 1941)).

(C) *The 1940 Act*

On September 16, 1940, when the present Selective Training and Service Act was passed, only declarant aliens were again subjected to induction (54 Stat. 884). On October 11, 1940, the Attorney General ruled that under the selective Service Act, every alien between 21 and 36 who lived or had a place of residence, temporary or otherwise, was required to register under the Act.[4] Diplomatic protests including those from Switzerland as indicated *supra* were again received based on treaty provisions and principles of international law. (Senate Report 394, 77th Congress, 1st Sess.) As Secretary of State Cordell Hull advised, one country indicated that under its laws its nationals are prohibited from serving in the armies of a foreign state and on numerous occasions in the past the United States had objected to the compulsory military service of its nationals in the armed services of foreign states even in the absence of treaty provisions. (Letter to Senator Reynolds, Chairman Committee on Military Affairs, May 23, 1941).

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[4] This interpretation has been rejected in *Kristensen* v. *McGrath*, 340 U.S. 162.

Section 303-a of the Selective Service Act was thereafter amended on December 20, 1941 (55 Stat. 844) to set forth the provision noted above at p. 3.[5]

The 1917 Act provided that neutrals who claimed draft exemption should be "forever" barred from citizenship. The 1940 Act merely provided that they should be thereafter debarred from becoming a citizen. In 1945, the Immigration Act of 1924 was amended to render inadmissible for permanent residence an alien who had become ineligible to citizenship under the 1940 draft act. (59 Stat. 551).

The procedure which was evolved for Treaty aliens under the 1940 Act has been described above. The State Department notes that "it does not appear that the treaty provisions were invoked by all the countries concerned". (Appendix D). The United States concluded treaties regarding military service exemption similar to that contained in the Swiss Treaty with nine additional countries. However, counsel is advised by the Legal Division of the State Department that only two of these countries, Spain and Costa Rica, invoked the Treaty procedure in Selective Service cases, and then only in rare instances. It should also be noted that we have executive agreements with nineteen foreign countries providing for the reciprocal induction of nationals of the contracting parties. (*State Department, Executive Agreement Series*, 241-350 et seq.)

(D) *The 1948 Act*

The Selective Service Act of 1948 (62 Stat. 604; 50 U. S. C. 454) applies as did the 1940 Act to all male citizens and other male persons residing in the United States. It grants

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[5] This amendment was primarily concerned with lowering of the draft age and the hearings and debates were concentrated on that subject. 87 Cong. Rec. Part 9, pp. 9921-9943; 9968-9985; Hearing before House Committee on Military Affairs on H.R. 6215, 77th Cong., 1st Sess. (1941); Hearings before Senate Committee on Military Affairs on S. 2126, 77th Cong. 1st Sess. (1941).

any alien, whether neutral or not, the right to claim draft exemption with the disability of debarment from citizenship. Under this Act, which contains no reference to treaty aliens and is substantially similar to the 1940 Act, treaty aliens enjoy a special status by regulations which incorporate the procedure described in Appendix D herein. Executive Order 9992, (32 C.F.R. 622.18; Federal Register August 30, 1948) provides as follows:

"Paragraph 622.18 Class IV-C: Aliens

* * * (b) In Class IV-C shall be placed any registrant who is an alien and who has not declared his intention to become a citizen of the United States and who is a national of a country with which there is in effect a treaty or international agreement exempting nationals of that country from military service while they are within the United States and for whom an application for deferment has been communicated to the Department of State by the government of that country and has been approved by the Department of State.

(c) In Class IV-C shall be placed any registrant who is an alien and who, prior to his induction has made application to be relieved from liability for training and service in the armed forces of the United States by filing with the local board an Application by Alien for Relief from Military Service (SSS Form No. 130) executed in duplicate. The local board shall forward the original of such form to the Director of Selective Service through the State Director of Selective Service and shall retain the duplicate in the registrant's Cover Sheet (SSS Form No. 101). * * *"

Thus it will be seen that the treaty alien may today claim exemption from the draft under a treaty without incurring the disability barring him from citizenship.

In connection with this bar of citizenship contained in our Selective Service Acts, our Government, either by statute or regulation, took great pains to eliminate any possibility of misunderstanding, by requiring, in effect, a voluntary act of citizenship renunciation on the part of

the alien claiming exemption. Thus, under the 1917 Act, which applied only to declarants, the overt act of surrendering the declaration of intention, in exchange for the exemption, was required. Under regulations supplementing the 1940 Draft Act, an express waiver in writing was required of every "neutral" alien, as distinguished from a "treaty" alien. The petitioner Moser was deprived of this protection against a misunderstanding when the State Department and the Selective Service System, together with the Swiss Legation, collaborated in order to achieve revision of the application for draft exemption (Form 301) so as to expressly delete there from the waiver of citizenship.

ARGUMENT

The Circuit Court Erred in Finding That the Selective Training and Service Act Controlled Petitioner's Status and Did Not Conflict With the Swiss Treaty.

I

The Swiss Treaty of 1850 granted draft exemption to its nationals without imposing the permanent bar "from becoming a citizen of the United States."

In *Hauenstein* v. *Lynham,* 100 U. S. 483 (1879) the Supreme Court recognized that this treaty was self effectuating and had become the law of the land. The Selective Training and Service Act of 1940 authorized relief from military service under the Act with the proviso that the applicant would incur a forfeiture of the privilege to become an American Citizen. The imposition of this condition from which the beneficiaries of the Treaty were free, if applied to a Swiss national was inconsistent with the provisions of our 1850 agreement with Switzerland. Obviously, the Selective Service Act added a condition, which did not heretofore exist, to the terms of the Treaty. The treaty granted Swiss aliens "residing or established"

in the United States freedom from military service with only the possible liability of "pecuniary or material contributions". The Selective Service Act required military service of all male aliens residing in the United States and then granted neutral aliens freedom from military service only if they waived the right to apply for American citizenship. If the Selective Service Act applied to Swiss nationals, they obviously could not freely exercise their right to be exempt from military service. This becomes more apparent when the Selective Service Act is read together with the amendment to the Immigration Act of 1924 (59 Stat. 551) which rendered inadmissible for permanent residence, neutral aliens who claimed draft exemption. The treaty gave Swiss aliens the right to reside and be permanently established in the United States and to claim draft exemption. The amendment to the 1924 Immigration Act (8 U. S. C. 224-c, 59 Stat. 551) renders them ineligible for permanent residence, if they are ineligible for citizenship.

Assuming, *arguendo*, that the treaty is susceptible of two constructions, it should be interpreted to grant Swiss aliens the right to claim draft exemption without any restrictive conditions not mentioned therein. "Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the later is to be preferred." *Hauenstein* v. *Lynham*, 100 U. S. 483; *Shanks* v. *Dupont*, 3 Pet. 242.

It remains to ascertain whether the conditions of the Selective Service Act abrogated the Treaty. The court below assumed that if a conflict existed the Treaty was *pro tanto* superseded.

When the Selective Service Act of 1917 (50 U.S.C.A. 226) containing a similar provision barring neutral aliens from citizenship was enacted, as the Circuit Court noted, "no one apparently thought such a treaty as this would

be affected by the law as passed. See 56 Cong. Rec. 8415-19, 8485." When the 1940 Act became law, our State Department officials asserted that "it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty". (Appendix B). Similarly, the Department of Justice ruled that "nationals of Switzerland were and are now entitled to claim exemption from military service on the basis of the Swiss Treaty" (*Matter of Hans Lowe*, A-5878178, July 14, 1947). This administrative construction of the Selective Training and Service Act of 1940 and the Swiss Treaty is entitled to great weight.

Norwegian Nitrogen Co. v. *U. S.*, 228 U. S. 294, 315 (1933);

United States v. *American Trucking Association*, 310 U. S. 534, 549 (1940);

Billings v. *Truesdell*, 321 U. S. 542, 552 (1944).

Thus, insofar as Congress and our administrative officials were concerned, it was not intended to abrogate, modify or suspend the right of Swiss nationals to claim draft exemption under the 1850 Treaty. Under these circumstances and in the absence of a clear expression by Congress that the Swiss Treaty was to be modified or suspended, it should not be concluded that the Selective Service Act of 1940 although inconsistent, had such effect.

In *Cook* v. *United States*, 288 U. S. 102, the government seized a British vessel suspected of smuggling liquor within the 12 mile limit authorized by the Tariff Act of 1930 which was a reenactment of the Tariff Act of 1922. The master of the vessel contended that the seizure was illegal under the British Treaty of 1924 which did not authorize seizures such distance from our shores. The Court held:

"The Treaty was not abrogated by reenacting section 581 of the Tariff Act of 1930 in the identical terms

> have been abrogated by a later statute, unless such purpose on the part of Congress has been clearly expressed."

See also: *United States* v. *Payne*, 264 U. S. 446.

In *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336, it was said:

> "The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July 1st when the present Immigration Act became effective. * * * That Act must be construed to preserve treaty rights unless clearly annulled * * *".

And in 2 Hyde, *International Law*, 1464, *et seq.*:

> It should be observed that the Supreme Court is wisely reluctant to construe an Act of Congress as in violation of an existing treaty . . . There appears to be no disposition to impute to it a readiness to disregard the terms of the international agreements of the United States."
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> "An intention to violate a treaty or to direct an act which would be a breach of national good faith is not to be imputed to Congress. While Congress has the power to violate treaties, it is obviously not to be assumed that Congress intends to exercise such a power unless its intention is unequivocally expressed." V Hackworth Dig. Sec. 489.

The Congressional history of the Selective Service Acts during World War I and World War II show that the intent of Congress was to comply with treaty obligations rather than to abrogate them. The Circuit Court below so ruled. Our executive departments advised the various neutral countries and in particular the Swiss Legation, that these treaties were not abrogated. And significantly, the 1948 Selective Service Act, although just as inconsistent with

the Swiss Treaty as the Draft Acts which preceded it, is presently being interpreted to grant exemption without debarment from American citizenship.

It is therefore submitted (1) that Section 3-a of the Selective Training and Service Act of 1940 if applied to a Swiss national was inconsistent with the Swiss Treaty of 1850 and (2) that the former did not supersede the Treaty because of the lack of an unequivocal expression by Congress to effect such an abrogation. And if the Treaty remained in full force and effect as contended, petitioner could claim exemption under the Treaty without forfeiting the privilege of becoming an American citizen.

II

The Circuit Court Erred in Finding That Petitioner Incurred the Disability of Permanent Exclusion from American Citizenshp under the Selective Training and Service Act of 1940.

(A) *The Selective Service Disability Was Not Incurred.*

The Selective Training and Service Act of 1940 as amended (50 App. U. S. C. 303a) specifically renders ineligible to naturalization "those relieved from liability under this Act." Accordingly, there is necessarily implicit in the decision below the finding that petitioner obtained exemption under the Selective Training and Service Act of 1940. Nevertheless, the record is clear, that petitioner sought exemption solely under the Swiss Treaty of 1850. (Exhibits 8, 9, 10, R. 29-31). Indeed, the court below recognized the procedure which petitioner followed for it stated (R. 65):

> "The appellee, however, attempted to obtain his exemption *not under the above statute* but under the treaty and he did so because he wished to become an American citizen as well as to get exemption. Indeed,

> we should recognize that his desire to become an American citizen was paramount in his mind, for the court below has found, because it believed appellee when he so testified, that he would not have sought exemption had he known that it would deprive him of naturalization rights." (Italics supplied.)

The Swiss Legation asserted that the Treaty of 1850 granted unconditional draft exemption without the disability of forfeiture of naturalization (Appendix A) and Treaty rights are to be liberally construed (*Chew Heong* v. *United States*, 112 U. S. 536). The State Department asserted that it was not the intention of the United States to deny any rights conferred by the Treaty (Appendix B). The Selective Service System recognized petitioner's claim for exemption as a "treaty" alien, rather than a "neutral" alien and expressly revised its form (D.S.S. 301) to effectuate the same. The Circuit Court found no treaty violation in the Selective Service Act of 1940 but nevertheless found that a Swiss alien could not assert draft exemption under the treaty without incurring the disability of the Selective Service Act. Two situations suggest themselves under the facts here presented:

(a) If the additional disability provisions of the Selective Training and Service Act did not apply to Swiss nationals because the Treaty remained paramount as contended in Point I, then such nationals might claim exemption solely under the Treaty. By its very language the citizenship bar of the Selective Training and Service Act attached only to those relieved under the Act. If the Treaty continued in force without modification, petitioner was relieved not under the Act but solely under the Treaty. He therefore remained eligible for citizenship and the District Court's decision should be affirmed.

(b) If the disabling provisions of the Selective Training and Service Act applied to Swiss nationals claiming draft

exemption under the 1850 Treaty either because (1) the Act was not inconsistent or (2) the Act was inconsistent but superseded the Treaty, then it is clear that petitioner mistakenly attempted to perform an act which was impossible as a matter of law, i.e. to seek draft exemption under the Treaty without incurring the disability of the Act. And petitioner's mistake was encouraged, known and induced by the Department of State and the Selective Service System. For as the District Court found (R. 65):

> "Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed revised form D.S.S. 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the Swiss Treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940 I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted."

Petitioner's request to his draft board was for "unconditional relief" from military service in conformity with the Treaty and with reference to the Secretary of State's note of July 6, 1942 (R. 30-31, Appendix B). It was so recognized by the Selective Service System. This was, as the District and Circuit Court found, a request to be relieved solely under the Treaty. (R. 59, 60, 65.) Petitioner therefore sought specifically not to be relieved under the Selective Training and Service Act. But, according to the Circuit Court the very relief under the Act which he disclaimed, was accorded to him.

The general rules of law and statutory construction should be applied herein. The strict letter of the statute must yield to avoid captious interpretations, *Delgadillo* v. *Carmichael*, 333 U. S. 338 (1947), and to avoid injustice. *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457 (1891). Where as here a penalty is imposed, the statute should be liberally construed to avoid the imposition of the penalty. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6 (1948). An exemption claim filed as here under a mistake known to, shared and induced by the Department of State and the Selective Service System—agencies upon whom one would naturally rely for advice upon treaty rights and draft exemption claims—should not carry with it the penalty of exclusion from American citizenship.

Mistake may be asserted in transactions between individuals and the government. *Williams* v. *United States*, 138 U. S. 514 517 (1890). Mistake is a well known legal concept which justifies relief in contracts (V *Williston and Thompson on Contracts*, p. 4399), real estate transactions (*Williams* v. *U. S., Supra*) wills (3 *Pomeroy Equity Jurisprudence*, 1941, p. 405) and in the law of marriage and divorce (3 *Nelson, Divorce and Annulment*, 1945, p. 316). That mistake may avoid a claim of draft exemption as in the case of one unable to read English has been recognized by the Department of Justice (*Matter of Lope Hormazabel* A 5725997. See also: *Neutral Aliens Who Claimed Exemption from Military Service, Monthly Review, Immigration Service*, November 1947, pp. 56, 59).

It is true that normally mistake of law will not permit the avoidance of an obligation. But where as here, the mistake of law was induced and shared by one to whom the mistaken party would normally look to for guidance as to the law, the courts will grant relief.

Thus, in *Staten Island Hygenia Ice and Cold Storage Co.* v. *U. S.*, 85 F. (2d) 68 (C. C. A. 2, 1936) it was held that

a cause of action for rescission of a tax compromise was stated where it was alleged that a mistake of law was induced by a United States tax collector. The court said at page 71:

> "Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is indu ed by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant . . . It should make no difference that the United States is the party against whom rescission is sought."

And where officials of the government, State or Federal, prevent a person from appealing his case to the higher courts, it is held that he has not waived his right of appeal. *Dowd* v. *U. S. ex rel. Cook,* 71 Sup. Ct. 262; *Cf. Ackerman* v. *United States,* 71 Sup. Ct. 209.

See also: V *Williston and Thompson, supra,* p. 4439.

Here, petitioner acted upon the advice extended to him by our State Department through the Swiss Legation that his treaty rights remained in full force. He was thereby led to believe that he could claim exemption under the treaty and not incur the Selective Service Act penalty. His claim for draft exemption was for unconditional release in conformity with the treaty. His mistake—if the Circuit Court's conclusion be accepted that draft exemption could not be claimed unconditionally, *i.e.,* without the citizenship bar—was one known and induced by our government. If petitioner's draft exemption claim as asserted without a bar to citizenship was impossible as a matter of law, the request should not have been accepted in part but should have been rejected. And the petitioner should have been informed that the only way he could achieve exemption was by signing the regular exemption Form 301, containing the express waiver of citizenship. The petitioner would thus have had the power of elec-

tion either to waive citizenship or serve in the Armed Forces. Now, to place him in the same position as if he had signed the regular waiver of citizenship would be highly inequitable. The mistake of petitioner in filing such a claim and the mistake of the government in honoring the claim should be relieved as a matter of equity. Under these circumstances a disability of a permanent bar to citizenship should not be imposed and the District Court's conclusion should be affirmed.

(B) *The Selective Service Disability Is No Longer Operative.*

By virtue of Section 16 of the Selective Service Act (P.L. 473, approved June 29, 1946), Section 3(a) of the Selective Training and Service Act of 1940 became inoperative on March 31, 1947. The Immigration Service realized that a serious question was thus raised as to whether the naturalization bar remained. It consulted the Assistant Solicitor General who ruled on August 13, 1947, that:

> "An alien who obtained an exemption from military service under this section was assumed to have rendered himself ineligible for naturalization until such time as the courts have passed upon the question." *Monthly Review, Immigration and Naturalization Service,* November, 1947, p. 56, Note 1.

Repeal of the naturalization bar after World War I operated to restore the right to apply for naturalization to those previously barred from naturalization as neutral aliens.

Interpretation 1 of the Immigration Service, June 5, 1941;

In re Carlson, 730-P 2 59687, D.C. Ill. 1942;

Petition of Otness, 49 F. Supp. 220 N.D. Calif. 1943;

Contra: In re Urmenta, 42 F. Supp. 138 (D.C. Wisc. 1941).

It is a commonplace of Anglo-American law that repeal of a statute eradicates it altogether, and the situation is as if it had never existed. 59 *Corpus Juris* 1189, 1190. Expiration of a statute is in this respect the same as repeal.

United States v. *Boisdore,* 8 How. 113;
The Irresistible, 7 Wheat. 551.

Congress in terminating the Selective Training and Service Act of 1940 was explicit and specific. It directed that the entire Act, with exceptions not here pertinent "*shall become inoperative and cease to apply*" at 12 o'clock noon on March 31, 1947, "except as to offenses committed prior to such Act." (Section 316, 50 U. S. C. App., enacted June 29, 1946). Thus there can be no dispute but that Section 3(a) of the Act died on March 31, 1947, without exceptions or savings clause.

In addition, the termination provisions themselves are expressly preserved, including the phrase "offenses committed prior to such date" (March 31, 1947). This clearly refers only to prosecutions under Section 11.

It seems clear that Congress intended thereby to terminate *all* of the provisions of this section, including those creating the disability for United States citizenship.

It is an elementary canon of statutory construction that the grant of one express power or function is also necessarily the implicit exclusion of all others. "*Expressio unius est exclusio alterius.*"

Express enumeration, therefore, of the exceptions and preserved functions contained in Section 16 of the Act, terminating all functions except enumerated, must necessarily be construed to mean that the citizenship disability created by Section 3(a) was not intended to be preserved.

At common law, the unqualified repeal or termination of a statute, without a saving clause, destroyed all rights and liabilities dependent upon it.

United States v. *Reisinger*, 128 U. S. 398;
Duke Power Co. v. *S. C. Tax Comm.* (C. A. 4, 1936), 81 F. (2d) 513, Cert. Denied 298 U. S. 669.

Statutes which have been enacted in derogation of the common law to prevent criminal prosecutions under the dying statute from being terminated, and to continue in existence criminal penalties, criminal liabilities and criminal forfeitures imposed under the erstwhile statute (*United States* v. *Reisinger, supra*), have been strictly construed [*United States* v. *Hark*, 320 U. S. 531.]

In *Ewell* v. *Daggs*, 108 U. S. 143, the Supreme Court held that after the repeal of a usury statute, a usurious rate of interest, forfeited under the statute while in force, was reinstated, the interest was payable, and no forfeiture could be enforced. For the life of the statute, the interest rate on the contract constituted a basis for forfeiture of the entire amount of the interest. At the statute's death, the disability fell.

Congress has, however, altered the common law rule with regard to the repeal or expiration of a statute. The Act of February 25, 1871 (16 Stat. 1871) merely continued penalties, forfeitures and liabilities where an act of Congress had been repealed. In 1942, Attorney General Biddle requested legislation to permit prosecutions where a temporary statute had expired. (*House Report 261, 78th Cong.; 1st Session.*) H.R. 1201, which subsequently became Public Law 201 on March 22, 1944, (61. Stat. 633) was entitled "An Act to permit prosecutions after lapse of a temporary statute for offenses committed prior to its expiration". The Committee Reports clearly make known the purpose of this statute. In *Senate Report 734, 78th Congress, 2nd Session*, it is described as follows:

> " • • • the purpose of the bill is to provide that the expiration of a temporary statute shall not have the effect of preventing *prosecution* of an *offense* committed under the temporary statute. The bill would

merely make applicable to *violations* of a temporary statute the same statutory provision "that is now in effect with respect to *offenses* against a statute subsequently repealed." (Italics supplied.)

Public Law 201 (61 Stat. 633) provides that the "expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide * * * "

Is ineligibility to citizenship, a penalty, forfeiture or liability, as the terms are utilized in Public Law 201? The statutory history of the law indicates that Congress was concerned with continuing prosecutions where there had been some violation of law. The terms "penalty" and "forfeiture" denote the punishment imposed for a crime, default, or offense against the laws of a state. (*McCulloch* v. *Murphy*, 125 Fed. 147; *Cook* v. *United States*, 288 U. S. 102, 122; *Life Insurance Co. of Tenn.* v. *McCray*, 291 U. S. 566, 574; 37 *C. J. S.* 45; 23 *American Jurisprudence* 598, 599, 622). Petitioner, herein, neither violated nor transgressed any law of the United States when he sought draft exemption. The term "liability", likewise, connotes an obligation arising from the breach of a statutory duty. (*National Labor Relations Board* v. *National Garment Co.* 166 F. (2d) 233, 237 and footnote 4). There is here involved no breach of a duty, statutory or otherwise.

Racial ineligibility to citizenship (8 U. S. C. 703) has never been considered a "penalty, forfeiture or liability" as the terms are understood in legal parlance. Citizenship ineligibility under 50 U. S. C. App. 303-a has never been so designated judicially. Nor should it be so considered any more than racial ineligibility. Citizenship ineligibility and denial of naturalization have always been designated as the denial of a privilege. *United States* v. *Ginsberg*, 243, U.S. 472; *In re Martinez*, 73 F. Supp. 101, 105. Public Law 201 is therefore inapplicable to the instant case.

In *Benzian* v. *Godwin,* 168 F. (2d) 952 (overruled on other grounds in *Kristensen* v. *McGrath,* 340 U. S. 162) reliance was placed upon an amendment to the immigration laws (8 U. S. C. 224-c; 59 Stat. 551, October 29, 1945) to establish the proposition that Congress had continued the citizenship bar of Section 303-a of the Selective Training and Service Act beyond March 31, 1947. Prior to October 29, 1945, it had been decided administratively that aliens who claimed exemption from the 1940 Selective Service Act and had become ineligible to citizenship, were nevertheless admissible to the United States for permanent residence. The Attorney General believed that this was an oversight of legislative draftsmanship and recommended that the immigration laws be corrected accordingly. No thought or consideration was then given to the expiration of 50 U. S. C. App. 303-a.[6] The assumption of the *Benzian* case that a correction of the immigration definitions contained in 8 U. S. C. 224-c, extended the provisions of the Selective Service Act or evinced an intention to do so, is unwarranted. In addition it should also be noted that the *Benzian* cause was moot prior to decision in the District Court. (Memorandum of Solicitor General in the Supreme Court, No. 317, October Term, 1948, Certiorari denied, 335 U. S. 886). It is therefore not persuasive as a precedent.

The passage of Section 303-a of the Selective Service Act created a new class of aliens ineligible for naturalization—*i.e.*, those neutral aliens who claimed draft exemption. But the termination of the Selective Service Act, without a saving clause expressly preserving that ineligibility, dissolved the newly-created class of ineligibles. The Act created a bar to citizenship, but removed the bar upon its own termination.

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[6] The legislative history of the 1945 amendment to 8 U.S.C. 224-c is reflected in the immigration file of Alvaro Valas, 56127/854.

Conclusion

Petitioner claimed draft exemption under the Swiss Treaty of 1850, pursuant to advice extended to him through channels from the State Department that the treaty was still in full force and effect. Congress did not intend to abrogate or suspend the treaty although it enacted a Selective Service statute which was inconsistent therewith. In the absence of a clear Congressional expression of an intention to abrogate the treaty—and the contrary appears here—the Selective Service Act should be interpreted to harmonize with the treaty. So interpreted, petitioner's draft exemption claim should be regarded as it would under the Selective Service Act of 1948 under which treaty nationals may claim draft exemption without incurring the disability of citizenship ineligibility.

The background of petitioner's claim for draft exemption as a Swiss Treaty national clearly demonstrates the inequity of now barring him from citizenship. As a Swiss citizen and army officer he faced criminal sanctions if he did not claim draft exemption. He had a sound basis for believing that he might claim draft exemption and later become an American citizen—a belief induced by officials of our government. And as the District and Circuit Courts found, he would not have claimed exemption if he had known that it would have barred him from citizenship. In any event the bar to citizenship is no longer operative.

Under these circumstances, the District Court properly admitted petitioner to citizenship and the decision of the Circuit Court should be reversed.

Respectfully submitted,

JACK WASSERMAN,
Warner Bldg.,
Washington, D. C.

MORRIS VOGEL,
Of Counsel.

APPENDIX A

Legation of Switzerland
Washington, D. C.

ad N.2.5.

June 5, 1942.

The Honorable Cordell Hull, Secretary of State, Washington, D. C.

SIR:

On November 25, 1850, the United States and Switzerland concluded a Treaty of Friendship and Commerce which ever since has governed the establishment and the treatment of citizens of the two countries living in the other. In Article II of this Treaty, the contracting parties agreed that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service."

Animated by the desire of regulating the military obligation of certain individuals possessing both the American and the Swiss nationality, the two Governments complemented the aforementioned Treaty with the signing on November 11, 1937, of a Convention, concerning the military obligations of certain persons having dual nationality. According to this convention, a person born in the territory of one of the two Parties, of parents of the other, who possesses the nationality of the two countries and has his habitual residence in the State of his birth, shall not be held liable by the other State for military service in case of a temporary stay in the territory of the latter.

By signing the Treaty of 1850, and the Convention of 1937, the Governments of the United States and of Switzerland have recognized the existence in their respective territories of colonies of nationals of the other Party, and they have allowed them to maintain all lawful ties with the homeland. These nationals who have retained their original citizenship, and who by *not* applying for naturalization have clearly demonstrated their intention of remaining citizens of their Mother country, should, therefore, not only by generally recognized International Law,

but also by Treaty, be exempt from any personal military service in the armed forces of the country of their residence.

Switzerland's policy has always been in complete agreement with said principle and the treaties. Although since 1850, the Swiss Government has been forced on several occasions by international circumstances to call up for total military mobilization the full man-power of the country, representing one eighth of the entire population, no American citizen had ever been enrolled for military service during these emergencies. This was in strict observance of the military exemption clause of the Treaty of 1850, and in recognition of the rights and duties of neutral persons under International Law.

With the Act of December 20, 1941, to amend the Selective Training and Service Act of 1940, by providing for an extension of liability for military service, the Selective Service has been empowered to enforce liability for military service upon any alien of a certain age who is a resident of the United States, irrespectively of the fact whether or not he has declared his intention to become an American citizen. The new Act provides that every male person residing in the United States between the ages of 20 and 45 shall be liable for training and service in the land and naval forces of the United States.

The enactment of this new law is evidently a departure of the United States from the general rule to conscribe for military service only "citizens of the respective country" and does not seem to be in harmony with the international usage, according to which no neutral shall be compelled to serve in the armed forces of a belligerent country. The Swiss Government esteems, therefore, that the application of the Selective Service and Training Act as amended to Swiss citizens is not reconcilable with the Treaty of 1850.

It is true that the new Selective Service Law provides for the possibility that a neutral alien may be released from all military obligations if prior to his induction in the armed forces of the United States, he has made application to be relieved from such liability, with the consequence, however, that any person who makes such an application shall thereafter be debarred from becoming a citizen of

the United States. This provision, offering a possibility of exemption to a Swiss resident, may in many cases result in a practical solution, but on account of the accompanying consequences it cannot bring the Act in harmony with the Treaty of 1850, which mentions no conditions whatsoever for the exemption from military service. Under the new Act, Swiss citizens would be allowed to enjoy the privileges established by the Treaty solely if they fulfill a material condition not mentioned and not understood in the Treaty.

The text of the Treaty of 1850 furthermore makes no discrimination between persons residing temporarily in the territory of the other party and those who are established permanently there. By inserting the military clause, the two contracting parties had the intention to exempt all their nationals from service in the armed forces of the other party. Under the terms of the Selective Training and Service Act of 1940, as amended, however, only those Swiss citizens who have been declared as "non-resident" in the United States have an opportunity to be unconditionally relieved from military service, while all those considered as residing permanently in the United States could not be exempt without at the same time being debarred from becoming an American citizen. This procedure would indeed place Swiss nationals in a less favorable position than even enemy aliens in the United States, who, if considered by the military authorities as not acceptable for military service or upon their own request, can be exempt from military duties without any further consequences.

I further beg to bring to your attention the situation of a number of Swiss citizens who were inducted into the American Army before the regulations providing for an exemption from service have been in force. Inasmuch as the new Act provides a possibility for exemption only if application is made prior to induction, these Swiss citizens do not have an opportunity to be relieved from military service. They are put in an extremely precarious situation as the Swiss military penal code of June 13, 1927, prohibits under severe penalties any Swiss citizen to enter the armed forces of a foreign country.

In the light of the foregoing, conscription of Swiss

citizens in the United States who have not declared their intention of becoming American citizens, contradicts the text and the spirit of the Treaty of 1850, as well as the principles governing the rights and duties of neutrals under international law.

I have been, therefore, instructed by my Government to approach your Excellency and to request from you to intervene with the appropriate authorities, in order that at least the Swiss citizens who have not declared their intention to become American citizens may be unconditionally exempted from the liability for military service.

Accept, Sir, the assurances of my highest consideration.

(Sig.) C. BRUGGMANN.

R/H.

APPENDIX B

SIR:

I have the honor to refer to your note ad N.2.5. of June 5, 1942 concerning the liability of Swiss nationals for military service in the United States.

The note calls attention to Article II of the Convention of Friendship, Commerce and Extradition between the United States and Switzerland, concluded on November 25, 1850, under which "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service", and to the Convention Regulating Military Obligations of Certain Persons Having Dual Nationality signed at Bern on November 11, 1937; and the view is expressed that under these conventions Swiss nationals in the United States are unconditionally relieved from military service.

I have taken note of your objection to the provisions of the Selective Service Act regarding the right of neutral aliens to obtain exemption by forfeiting their right thereafter to become American citizens.

All male persons within certain specified ages "residing in the United States", unless otherwise exempted, are required by Section 2 of the Selective Training and Service Act of 1940 to register and are made liable for military service by Section 3(a) of the Act:

Swiss nationals temporarily in the United States are not considered to be "residing in the United States" within the meaning of that term as used in the Selective Training and Service Act of 1940 and therefore are not required to register or to render military service under that Act. It is, however, incumbent upon those persons whose departure from the United States is to take place more than three months after their entry to make application within such period of three months to the Local Draft Board in the place in which they are staying for a determination of their residence status. When such determination establishes that they are here temporarily, they are issued a certificate of non-residence which, during the period of its validity, exempts them from registration and military service. Such certificates are renewable upon application. Swiss nationals temporarily in the United States who have registered for military service in error may have such registration canceled by following the procedure for determination of residence.

In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above whether such requests be made by the nationals themselves or by you in their behalf.

Accept, Sir, the renewed assurances of my highest consideration.

For the Secretary of State:

A. A. BERLE, JR.

July 6, 1942.

APPENDIX C

In a letter dated Nov. 18, 1949, the Swiss Legation, writing to Hans Thummel, one of its Nationals, sets forth some of the facts which explain why it advised its subjects to execute DSS Form 301, revised, as follows:

"The Legation had the opportunity to discuss with the competent United States authorities the various

problems pertaining to the procedure to be followed by Swiss nationals in obtaining exemption from military service in this country. It was the purpose of these exchanges of views to ascertain whether the existing procedure could be modified, in order to bring it in complete harmony with the text and intent of article 2 of the Treaty . . . The Legation always maintained the point of view that the exemption of Swiss nationals from military service in the United States, pursuant to the provisions of the treaty, be unconditional, i. e. that the Swiss citizens shall be allowed to enjoy the privileges established by the Treaty without being compelled to fulfill material conditions not covered by the Treaty. Therefore, the Legation considered the requirement of signing a 'waiver of the right to apply for naturalization' when applying for exemption from military service, as a condition contrary to the Treaty of 1850.

* * * * * * *

"However, the Department of State assured the Swiss Government that it is not the intention of the United States Government to deny to Swiss nationals any rights or privileges conferred on them by Treaty.

"In lengthy conversations the Legation, the State Department and the Selective Service-System endeavored to work out a procedure for the exemption of non-declarant Swiss nationals which would be in conformity with the laws and the provisions of the Treaty of 1850. Finally, the following procedure to be followed by Swiss in obtaining exemption was established:

1. The Legation formally requested the exemption . . . The individual requests made by the Legation on behalf of Swiss nationals was based on article 2 of the Treaty of 1850.

2. The text of Form DSS-301 was expressly modified and was understood not to contain any waiver of the right to apply for naturalization . . .

3. The State Department was of the opinion that the applicant by filing the revised DSS Form 301 did neither waive nor forfeit his rights to apply for naturalization . . ."

APPENDIX D

Department of State
Washington

January 22, 1951

Mr. Jack Wasserman, Counsellor at Law, Warner Building, Washington 4, D. C.

My Dear Mr. Wasserman:

I have received your letter of January 5, 1951 concerning the case of *Moser* v. *the United States* in which certiorari has been granted by the Supreme Court of the United States. You request the Department's assistance in obtaining the following material and information requested by the Court in connection with the case:

(1) Preparatory work concerning the negotiations leading up to the conclusion of the Treaty of Friendship, Commerce and Navigation of 1850 between the United States and Switzerland;

(2) Names of countries other than Switzerland with which this country has treaties containing provisions for reciprocal exemption from military service; and

(3) The practice under the Selective Training and Service Act of 1940 in dealing with citizens of countries with which the United States had treaties similar to the Swiss treaty.

With respect to the Court's first request, you are advised that the records of the negotiations leading up to the conclusion of the Treaty of Friendship, Commerce and Navigation of 1850 between the United States and Switzerland are to be found in the National Archives and that you may arrange to examine them by consulting Mrs. Carroll, Room 5 E, Foreign Affairs Section, National Archives. There is also considerable material regarding the negotiation of this treaty in Hunter Miller's *Treaties and Other International Acts of the United States of America* (U.S. Government Printing Office, 1937).

In respect to the Court's second inquiry, you are advised that this Government has concluded treaties containing

provisions regarding military service similar to that contained in the Swiss treaty with the following countries: Argentina, China, Costa Rica, Ireland, Italy, Paraguay, Thailand, Spain and Yugoslavia. The treaties with China, Ireland and Italy were concluded subsequent to the enactment of the Selective Training and Service Act of 1940.

In response to the third question raised by the Court, the Department desires to point out that a procedure was worked out between it and Selective Service whereby the Embassy or Legation of the country of which an alien was a national would transmit to the Department an application for the alien's exemption on the basis of the treaty with that country. If the Department was satisfied that the treaty was applicable and approved the application, it would transmit such application to National Selective Service Headquarters, with the statement that it had been approved. The latter would thereupon notify Selective Service Headquarters of the particular state in which the alien was registered and the state headquarters would in turn notify the alien's local board. The same procedure was followed with respect to nationals of the other countries with which treaties had been concluded as was followed in the case of Swiss nationals. However, it does not appear that the treaty provisions were invoked by all the countries concerned.

Sincerely yours,

RAYMOND T. YINGLING,
Assistant Legal Adviser

APPENDIX E

National Headquarters
Selective Service System
21st Street and C Street N.W., Washington, D.C.

April 1, 1943

State Director of Selective Service, 76 State Street, Albany, New York

Attention: Colonel A. V. McDermott.

Subject: Giulio Monleone, Order No. 12285, Local Board No. 133, Brooklyn, New York

Dear Sir:

The above subject claims the right to exemption from service in our armed forces under the terms of a treaty between the United States and the Government of Switzerland, of which country he claims to be a national.

His file is returned herewith, and you are requested to instruct the local board to inform the subject that his application for relief from military service must be made on his behalf by the Embassy of his government, through our State Department. A revised Form 301, issued under the Regulations in accordance with section 3 (a) of the Selective Training and Service Act of 1940, as amended, will be given to the subject by the Embassy of his government for execution and proper filing by him with the local board.

It is to be noted that the above applies only to those neutrals claiming exemption by virtue of a treaty. Form 301, now in your possession, may be used by the local boards in accordance with section 622.43 of the Regulations, for execution by all those neutrals not claiming exemption by virtue of a treaty.

For The Director,

Robert B. Coons,
Lt. Colonel, AUS,
Ass't Chief, Manpower Division

National Headquarters
Selective Service System
21st Street and C Street, N. W.
Washington, D. C.

April 1, 1943.

State Director of Selective Service for New York City,
1 East 44th Street, New York, New York.

Subject: Hans W. Thummel
Order No. 439A
Local Board No. 31
New York, New York

DEAR COLONEL MCDERMOTT:

The above subject claims the right to exemption from service in our armed forces under the terms of a treaty between the United States and the Government of Switzerland, of which country he claims to be a national.

His file is returned herewith, and you are requested to instruct the local board to inform the subject that his application for relief from military service must be made on his behalf by the Embassy of his government, through our State Department. A revised Form 301, issued under the Regulations in accordance with section 3 (a) of the Selective Training and Service Act of 1940, as amended, will be given to the subject by the Embassy of his government for execution and proper filing by him with the local board.

It is to be noted that the above applies only to those neutrals claiming exemption by virtue of a treaty. Form 301, now in your possession, may be used by the local boards in accordance with section 622.43 of the Regulations, for execution by all those neutrals not claiming exemption by virtue of a treaty.

For The Director,

ROBERT B. COONS,
Lt. Colonel, AUS,
Ass't Chief, Manpower Division.

Copy

Copy of this letter sent to Mr. Rowlands, M.I.T., 4/12/43.
Mr. Schaublin, Legation of Switzerland, 4/12/43.

National Headquarters
Selective Service System
21st Street & C Street, N. W.
Washington, D. C.

In Replying address: The Director of Selective Service and refer to No. 11-4.1-106.

April 3, 1943.

State Director of Selective Service, 38 Chauncy Street, Boston, Massachusetts.

Subject: Robert C. Habich
Order No. 722
Local Board No. 45
Cambridge, Mass.

DEAR COLONEL SMITH:

The above subject claims the right to *exemption from service in our armed forces* under the terms of a *treaty between the United States* and the Government of *Switzerland*, of which country he claims to be a national.

His file is returned herewith, and you are requested to instruct the local board to inform the subject that his *application* for relief from military service must be made on his behalf by the *Embassy of his government*, through our State Department. A *Revised Form 301*, issued under the Regulations in accordance with section 3 (a) of the Selective Training and Service Act of 1940, as amended, will be given to the subject by the Embassy of his government for execution and *proper filing by him with the local board.*

It is to be noted that the above applies only to those neutrals claiming exemption by virtue of a treaty. Form 301, now in your possession, may be used by the local boards in accordance with section 622.43 of the Regulations, for execution by all those neutrals not claiming exemption by virtue of a treaty.

For the Director,

ROBERT B. COONS,
Lt. Colonel, AUS,
Ass't Chief, Manpower Division.

APPENDIX F

April 13, 1943.

David Kaufman, Captain, Selective Service, 1 East 44th Street, New York City.

Re: Jakob Stori
Order No. 10,769A

DEAR CAPTAIN KAUFMAN:

Pursuant to our telephone conversation this afternoon. The above registrant is a Swiss who came to this country on February 19, 1943. He registered and in the regular way supplied Questionnaire, etc. Last night at the Board Meeting he told the Board that he came to this country because he wanted to come but he objected to going into the Army. He was married on April 3, 1943, in this country.

We suggested that if he did not desire to serve in the military force that he file Form 301, explaining that if he did so, it would debar him from becoming a citizen of the United States. He then submitted to us a mimeographed letter from the Swiss Legation in Washington in which the statement was made that this Form had been revised and that by signing it he would not be debarred from becoming a citizen in due course of time.

I am referring this matter to you so that there will be no mistake about it being handled properly and the facts regarding where they should be.

Please advise.

Very truly yours,

W. D. RAWLINS,
Chairman.

APM

Selective Service
New York City Headquarters
1 East 44th Street
New York City

April 16, 1943.

Mr. W. D. Rawlins, Chairman, Local Board No. 252, 9 Station Square, Forest Hills, New York.

Subject: Jakob Stori
Order No. 10769-A

DEAR MR. RAWLINS:

Reference is made to your letter of April 13th regarding the filing of DSS Form 301.

The Selective Training and Service Act of 1940, as amended, and the Selective Service Regulations, sets forth the disability connected with the filing of DSS Form 301 by providing that an alien registrant who is a citizen or subject of a neutral country shall be relieved from liability for military training and service, but that any person who makes such application shall thereafter be debarred from becoming a citizen of the United States.

The revised Form 301 to which the registrant refers can only be filed by persons who claim exemption from military training and service by virtue of a Treaty. *A person who claims such exemption should be advised that the Application for Relief from Military Service must be made on his behalf by the Embassy of his Government through the State Department.* If the Embassy does not take action, the registrant is liable for training and service unless he voluntarily files the current DSS Form 301.

It you desire any further information, you are at liberty to call Mr. David Kaufman of this Headquarters.

For the New York City Director

ABRAHAM KAUFMAN,
Major, Infantry,
Chief, Manpower & Operations Division.

April 20, 1943.

Mr. Jakob Stori, 4 Montview Road, Summit, N. J.

Re: Order No. 10769A

DEAR SIR:

Further to your request for a release from military service, upon investigation of a case of this nature we learn that an application for Relief from Military Service must be made in your behalf by the Swiss Embassy, through the State Department, if you feel you come under the exemption clause.

If the Embassy does not take action, you are liable for training and service in the United States Military Service unless you voluntarily file the current D.S.S. Form 301.

We will proceed in the regular way on your case unless we hear further from you with reference to the exemption clause.

Very truly yours,

W. D. RAWLINS,
Chairman.

APM.

APPENDIX G

Selective Service
New York City Headquarters
1 East 44th Street
New York City

April 15, 1943.

Mr. Frank T. Keliher, Chairman, Local Board No. 133, 129 Montague Street, Brooklyn, N. Y.

Subject: Giulio Monleone
Order No. 12285

DEAR MR. MONLEONE:

We return herewith the file of the above registrant together with a copy of a letter from National Headquarters

concerning him. Please comply with the instructions contained in the attached letter.

You will note that it is not every neutral alien who is required to apply for the Revised Form 301 through his Embassy. Only those claiming *special status* by virtue of a Treaty are required to do so. All others are to be processed in the safe manner as heretofore.

For the New York City Director

ABRAHAM KAUFMAN,
Major, Infantry,
Chief, Manpower & Operations Division.

Encs.

APPENDIX H

Feb. 13, 1951.

6-59-1.

Mr. Philip B. Perlman,
Solicitor General,
Department of Justice,
Washington 25, D. C.

Dear Mr. Perlman:

This will reply to your letter of February 1, 1951, requesting a statement regarding selective service practice in dealing with citizens of countries with whom the United States had treaties similar to the Convention of Friendship, etc., concluded November 25, 1850, between the United States and the Swiss Confederation, in administering the provisions regarding aliens of the Selective Training and Service Act of 1940, as amended.

This Act, as originally enacted September 16, 1940, provided in Section 3 (a) "Except as otherwise provided in this Act, every male citizen of the United States and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States."

Section 5 (a) of the Act enumerated as those aliens to be exempt from registration and service, diplomatic representatives, technical attaches of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, residing in the United States, who were not citizens of the United States, and who had not declared their intention to become citizens of the United States.

With the entry of the United States into the war following Pearl Harbor, the alien residing in the United States took on greater importance, both as an available source of manpower and as a possible menace to our national security. The Congress took cognizance of these facts and on December 20, 1941, amended the Selective Training and Service Act of 1940 in regard to the liability of aliens for military service. As amended December 20, 1941, Section 3 (a) read as follows:

> "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: Provided further, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces."

Section 5 (a) was amended by inserting a comma after the words "foreign countries" following the enumeration

of the aliens to be exempt from registration and service and adding the phrase "and persons in other categories to be specified by the President."

Neither the Selective Training and Service Act of 1940, under which the Selective Service System operated until it expired on March 31, 1947, nor the Selective Service Regulations contained provisions, either as originally enacted or as amended, for the exemption of any alien by reason of a treaty provision. This Act provided a way for the exemption of aliens who are subjects, nationals or citizens of neutral countries and all citizens of neutral countries were treated in the same way in the application of the Selective Service Law regardless of whether or not the alien's neutral country had a treaty with the United States relating to military service of its subjects while in the United States.

The Department of State transmitted from time to time communications from foreign embassies and legations of cobelligerent and neutral countries to National Headquarters of the Selective Service System requesting that an alien be relieved from military obligations by reasons of the provisions of a treaty.

Selective Service never considered the alien's right to exemption to rest on the fact that he was a treaty alien but considered the status of his country in the war, as to whether it was a cobelligerent, neutral, or enemy nation. However, if the alien was a subject of a neutral country with which the United States had a treaty providing for military exemption, his local board through the Director of Selective Service for the State in which the local board was located was informed by a form letter (Form Letter No. 12, copy attached) that a claim had been made for his exemption under the terms of a treaty, and that as a *neutral alien* he was entitled to file an Application by Alien for Relief from Military Service (Form 301).

Selective Service advised the Department of State by form letter (Form Letter No. 11, copy attached) that the alien's local board was being instructed to inform him that he might obtain from his embassy or legation an Application by Alien for Relief from Military Service (Form 301, Revised).

The original Form 301 referred to in Form Letter No. 12 as the "old Form 301 (16-26414-1)" was approved December 31, 1941. This Form 301, which was printed on one page, contained a statement near the center of the page and above the place for the registrant's signature, which had to be attested before a notary public, as follows: "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States."

Because of the objections of some neutral aliens to having this statement above their attested signature, this form was revised on March 16, 1943, to eliminate the statement. Instead there was added near the bottom of the form (Form 301, Revised) below the place for the alien registrant's signature the provision in Section 3 (a) of the Act that a neutral alien who requested relief from military service would be debarred from future citizenship.

The deletion from the original form above referred to was not considered by Selective Service to constitute a recognition of any special right in a treaty alien. It was always the position of the Selective Service System that the signing of either the original or revised Form 301 clearly brought the alien within the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended December 20, 1941. Every Form 301 signed by a neutral alien was processed in the same manner and the original thereof was sent to the Immigration and Naturalization Service of the Department of Justice as evidence that the particular alien had secured an exemption from liability from military training and service solely by reasons of the provisions of Section 3 (a) of the Act.

Due to a mistake in proposing the revision of this form, it was first printed without the statement of the law at the bottom. This mistake was discovered shortly after the revised version was returned to Selective Service Headquarters by the printer and, so far as can now be recalled, this version was never used since it was not considered fair to the alien to let him sign a form that carried no notice or reference to the fact that such action would debar him from future citizenship in the United States.

The Revised Form 301 approved and used by Selective

Service carried the statement of the law and this is the Revised Form 301 referred to in both Form Letters Nos. 11 and 12 to be used by all neutral aliens who desired to sign it. The old Form 301 had been printed in quantity and all local boards had a supply of these forms. For economical reasons only a small number of the revised form was issued and it was to be used only in those cases in which the neutral alien requested it until the supply of the old form was exhausted. However, any neutral alien could use the revised Form 301, whether or not his country had a treaty with the United States.

Selective Service took the position that the type of form used by the neutral alien to apply for relief from military service was immaterial, just so it was the form prescribed by the President, as the law was clear and unequivocal that such action would debar the alien from future citizenship in the United States.

No agreement either written or verbal was ever made by Selective Service with the Department of State or any foreign embassy or legation to recognize treaty rights relative to military service or to give any different or preferred treatment to the nationals of any country by reason of the fact that a treaty existed. All aliens of neutral countries were treated the same under similar circumstances in accordance with the provisions of the Selective Training and Service Act of 1940, as amended, and the regulations prescribed for its administration.

Sincerely yours,

LEWIS B. HERSHEY,
Director

CC: Mr. Jack Wasserman, Counselor at Law, Warner Building, Washington 4, D. C.

Copy

National Headquarters
Selective Service System
21st Street and C Street N.W., Washington 25, D. C.

The Honorable
The Secretary of State

Subject: (Registrant's Name)
Local Board No.
(Address)
Your reference:

My Dear Mr. Secretary:

Reference is made to your letter of (Date), regarding the above-named registrant.

We are instructing his local board to inform him that he may obtain from the (Embassy or Legation) an Application by Alien for Relief from Military Service (Form 301, Revised), which form has previously been approved by you.

Sincerely yours,

Director

Copy

National Headquarters
Selective Service System
21st and C Streets NW, Washington 25, D.C.

State Director of Selective Service
(Address)

Subject: (Registrant's Name)
Local Board No.
(Address)

DEAR . . . .

The above-named registrant claims exemption from service in our armed forces under the terms of a treaty between the United States and (Country) of which latter country he states he is a national. As a neutral alien he is entitled to file an Application by Alien for Relief from Military Service (Form 301).

He may obtain an old Form 301 (16-26414-1) from the local board, or he may obtain a revised Form 301 (16-33666-1) from the (Embassy or Legation) for execution and filing by him with the local board.

Until the supply on hand is exhausted the old Form 301 may be used by the local boards in accordance with section 622.43 of the Regulations. However, if a special request is made by a registrant for a revised Form 301, he may secure it by application either to his Embassy or Legation, or to National Headquarters through his local board.

For the Director,

(Officer's Name)
(Rank)
Foreign Liaison Section
Manpower Division

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 301

PAUL MOSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JACK WASSERMAN,
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Washington, D. C.,
Attorney for Petitioner.

MORRIS E. VOGEL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

The basic difference between the parties to this litigation is whether petitioner's rights are measured by the Treaty of 1850 or the Selective Service Act of 1940. Through World War I and World War II, the Selective Service System, in its quest for military strength, construed the Draft Acts as repealing the treaty. The State Department on the contrary, intent upon preventing the compulsory induction of our citizens abroad and preserving international obligations, sought to maintain the treaty. (See Government Brief, pp. 49-50, A-20). The situation which followed produced the controversy which this case poses.

The Treaty of 1850 provides that nationals of each coun-

try "residing or established in the other, shall be free from personal military service." The Selective Service Act of 1940 as amended provides in direct conflict that "every male citizen of the United States and every other male person residing in the United States . . . shall be liable for training and service . . . ." Does the added proviso permitting neutrals to be exempt upon filing an application and with debarment from citizenship bring the Draft Act into harmony with the Treaty?

1. The Government properly evaluates the Treaty in stating that the signatories did not contemplate "conditions on exemption which would render that grant nugatory", and in its conclusion that the treaty did not contemplate the denial of such rights as the exercise of one's profession as a consequence of freedom from military service. (Gov't Brief pp. 31-33). The Treaty contemplated that a Swiss citizen could reside, establish himself and work in the United States. And at the same time, it contemplated that he would be free from military service. But if petitioner is ineligible to citizenship under the Selective Service Act, then he is free from military service, but not free to work or practice his profession as a civil engineer. In most states including New York where he resides, aliens ineligible to citizenship may not practice a profession. *Konvitz The Alien and the Asiatic in American Law* (1946), pp. 171, 190, 203. It is submitted that if the Selective Service Act controls petitioner's status first in subjecting him to the draft, and secondly in exempting him only if he waives the rights to citzenship and to practice his profession that it is in contravention of the Treaty.

2. Petitioner sought exemption from military service under the Treaty (R. 30). Unlike the plaintiff in *Savorgnan* v. *United States*, 338 U. S. 491, his intent was disclosed and known to responsible officials of our government. The Legal

Adviser to the State Department, Green H. Hackworth, advised the Selective Service System of Mr. Moser's application on February 4, 1944 and added that "the Department has previously expressed the view that under the provisions of Article II of the Convention of Friendship, Commerce and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service" (Gov't Br. A-57). If this Article of the Treaty was in full force and effect in February of 1944 when Moser claimed exemption, then he was exempt under the Treaty and not subject to the Selective Service Act of 1940. "If there was no 'liability' for service, the disqualification for citizenship under the penalty clause could not arise because the applicant had not made the 'application' referred to in the statute, as 'such application.' 'Such application' refers to an application to be relieved from 'such liability.' As there was no 'liability' for service, his act in applying for relief from a non-existent duty could not create the bar against naturalization." *Kristensen* v. *McGrath*, 340 U. S. 162.

3. Moser pursued an elaborate procedure to claim draft exemption under the Treaty—a procedure which the government now implies was meaningless, useless and unnecessary. The draft exemption application was revised to omit the statement that it was filed under the Selective Service Act and to delete the acknowledgment that it would debar the applicant from citizenship. The regulations were amended to omit the statement that a draft exemption claim would debar from citizenship. The Swiss Legation requested the State Department on behalf of Moser for exemption under the Treaty. The State Department requested Selective Service to exempt Moser under the Treaty. Moser advised his Board in writing that he was claiming

exemption under the Treaty (Gov't Br. 14-19, 65, A-57, R. 29-31).

The Swiss Legation was led to believe that this gave Moser and others like him the unconditional relief from military service it contended the Treaty extended to Swiss nationals. (See Pet. Br. Appendix C, p. 37; Appendix F, p. 44). Its advice to petitioner that he would not waive his right to apply for American citizenship was based upon the fact that the Treaty granted unconditional exemption. The normal procedure whereby naturalization is conferred, is through the courts—and the statement that the final decision "regarding your naturalization will remain solely with the Naturalization Courts" (R. 30-31) could refer to judicial naturalization and nothing more. Moser, a layman, could not be expected to realize the distinction between the "right to apply" and the "right to obtain" naturalization suggested by the government (Br. 83). We likewise disagree with the government's assertion that "recognition of a treaty right to exemption in no way constituted recognition of a concomitant right to be free from the consequences of debarment from citizenship" (Br. 81). Recognition of the Treaty to the Swiss and to Moser meant unconditional exemption without debarment from citizenship. (Pet. Br. App. A, p. 33)—a right to be free of the liability to serve under the inconsistent Selective Service Act. If Moser did not have this treaty right, then he was misled by our State Department and his exemption claim should not bar him from citizenship. This is not citizenship by estoppel as against the government but an interpretation of Mr. Moser's conduct in the light of equitable considerations. If he signed the exemption claim under duress, he would be relieved without an estoppel against the government. His conduct, if induced by mistaken advice

extended by the government, can likewise be relieved without asserting a claim of estoppel against the government.

We submit that this case is like *Cook* v. *United States*, 288 U. S. 102, where an inconsistent subsequent statute was brought into harmony with the earlier British Treaty to give the latter full effect in the light of a similar administrative construction. To give the Treaty full effect here is to affirm the grant of naturalization. To give the Selective Service Act full effect is to abrogate the Treaty and then petitioner would have been misled as to his rights by our State Department. In either event, the judgment below should be reversed.

Respectfully submitted,

JACK WASSERMAN,
Warner Bldg.,
Washington, D. C.

MORRIS VOGEL,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 301

PAUL MOSER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 80-85) is reported at 85 F. Supp. 683. The opinion of the Court of Appeals (R. 88-93) is reported at 182 F. 2d 734.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1950 (R. 94). The petition for a writ of certiorari was filed on September 11, 1950.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a Swiss national, who, upon his voluntary application, was granted exemption from military service as a neutral alien, as permitted by Section 3(a) of the Selective Training and Service Act of 1940, is debarred from becoming a citizen of the United States, in accordance with the terms of that subsection.

STATUTE, REGULATION, AND TREATY PROVISION INVOLVED

The Selective Training and Service Act of September 16, 1940, c. 720, 54 Stat. 885, *et seq.*, as amended by the Act of December 20, 1941, c. 602, § 2, 55 Stat. 845, provided in pertinent part:

* * * * *

> Sec. 3 [50 U. S. C. App. 303]. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States [within specified age limits] shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in ac-

cordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

* * * * *

Sec. 16 [50 U. S. C. App. 316]. (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

* * * * *

Selective Service Regulation 622.43 (32 C. F. R. [1943 Cum. Supp.] 622.43) provided in pertinent part:

§ 622.43 *Class IV-C: Neutral aliens requesting relief from training and service* * * *.

* * * * *

(b) When an alien registrant who is a citizen or subject of a neutral country (see § 601.2) at any time prior to his induction into the land or naval forces of the United States files with his local board an Application by Alien for Relief from Military Service (Form 301) executed in duplicate, he shall be placed in class IV-C. * * *

Article II of the Convention of Friendship, Reciprocal Establishments, Commerce &c., between the United States and the Swiss Confederation, concluded November 25, 1850, and proclaimed No-

vember 9, 1855 (11 Stat. 587, 589), provides in pertinent part:

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.

* * * * *

STATEMENT

Petitioner, a 39-year old university graduate and a civil engineer (R. 10, 32, 45, 47), is a Swiss national and a native of Switzerland who first entered the United States as a visitor on July 6, 1937 (R. 10, 12, 29). On December 25, 1937, he went to Canada and was readmitted to the United States on December 29, 1937, as an immigrant for lawful permanent residence (R. 29). On March 9, 1938, he filed a declaration of intention to become a citizen in the United States District Court for the Eastern District of New York (R. 22). On May 11, 1940, he left the United States for Switzerland for the purpose of rejoining his unit in the Swiss Army, in which he held a reserve commission as First Lieutenant in the Corps of Engineers (R. 26, 51, 73, 80-81). Following this tour of duty in the Swiss Army, he reentered the United States on October 11, 1940, as a non-quota immigrant return-

ing to an unrelinquished domicile (R. 32, 68, 71). On March 27, 1942, he filed a petition for naturalization (R. 5-6), alleging that on October 19, 1940, he had married a native-born citizen of the United States, and claiming the exemptions granted to spouses of United States citizens under the general provisions of the Nationality Act of 1940 (8 U. S. C. 710 (b)). Having repeatedly failed to appear for a final hearing after being given due notices and warnings, his petition for naturalization was dismissed on July 5, 1945, for lack of prosecution (R. 7, 12).

On March 31, 1948, petitioner filed a new petition for naturalization (R. 12-13), again claiming the exemptions granted spouses of citizens under the Nationality Act of 1940. The case came on for hearing, before District Judge Kennedy of the District Court for the Eastern District of New York, on March 10, 1949 (R. 56-61), was continued on June 9, 1949 (R. 62-77), and was concluded on July 21, 1949, with petitioner being admitted to citizenship (R. 4, 78, 85). Petitioner was present and represented by counsel throughout these hearings, in the course of which the Immigration and Naturalization Service objected to the granting of the petition on the ground that petitioner was ineligible for citizenship, having incurred such disability under Section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra*, pp. 2-3), by applying for and being granted exemp-

tion from military service in the armed forces of the United States as a neutral alien (R. 56-79).

It was shown at the hearings that on February 26, 1944, petitioner executed, and filed with local Selective Service Board No. 14 in New York City, Form DSS 301, entitled "Application by Alien for Relief from Military Service" (R. 17-18, 56-57), and that in consequence thereof the local board placed him in Class IV-C (see Selective Service Regulation 622.43 (b), *supra*, p. 3), thereby relieving him from military service as a neutral alien (R. 16, 53-54). It further appeared at the hearings that the DSS 301 Form executed by petitioner was a "revised" form, in that the following acknowledgment—"I understand that the making of this application to be relieved from such liability [for military service] will debar me from becoming a citizen of the United States"—which appeared in the body of the old form (R. 19-21) above the space for the applicant's signature (see R. 19), did not appear in the new form (R. 17-18), which petitioner signed; and that, in lieu of the above-quoted acknowledgment, the revised form (R. 17-18) contained the following *caveat*, in the form of a footnote appearing below the space for the applicant's signature (see R. 18):

> Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provides in part "That any citizen or subject of a neutral country shall be relieved from liability for

> training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

There was also evidence that this revised form, containing no personal acknowledgment of future ineligibility for citizenship, had been prepared for use by nationals of countries having treaties with the United States guaranteeing reciprocal military exemption, in accordance with an agreement between officials of the Swiss Legation, the United States Department of State, and the Selective Service System of the United States (R. 34-39, 57-60).

It was contended on behalf of petitioner at the hearings that he was exempt from military service under the provisions of Article II of the 1850 Convention of Friendship, &c., between the United States and Switzerland (*supra*, pp. 3-4), irrespective of the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra*, pp. 2-3) (R. 57-59). The Government's contention was that petitioner's status was controlled by Section 3 (a) of the Selective Training and Service Act of 1940, as amended, irrespective of the 1850 treaty, and that the revision of Form DSS

301, by means of which he obtained exemption from military service, as provided by the Act, did not nullify or in any respect modify the legal implications of the exemption.

Evidence was adduced at the hearings that petitioner at various times sought deferment under the Selective Training and Service Act of 1940 on grounds other than his status as a neutral alien (R. 51-55, 71-72). On January 15, 1941, he executed a Selective Service Questionnaire wherein he requested a Class III or IV classification for the reasons that his wife was expecting a child, that he was a citizen of Switzerland, and that he had spent approximately two years in the armed forces of Switzerland in the capacity of a First Lieutenant in the Corps of Engineers (R. 41, 51-52). His local board originally classified him in Class III-A (dependency classification); but on January 11, 1944, changed his classification to I-A (available for military service) (R. 53). It was after this reclassification that he first began to seek, on January 24, 1944 (R. 26-27), information from the Swiss Consulate in New York in regard to deferment from military service because of his status as a neutral alien. Following affirmance by the reviewing body of his local board of his reclassification in Class I-A (R. 53), petitioner, on February 26, 1944, executed and filed Form DSS 301 (R. 17), on the basis of which he received, on February 28, 1944, a IV-C classification (R. 16, 53),

exempting him from military service as a neutral alien, in which group he remained until October 9, 1945, when he was reclassified IV-A (over age for military service) (R. 53, 55).

District Judge Kennedy, after asking petitioner whether he would have made the claim for exemption from military service as a neutral alien if he knew that thereby he would be debarred from United States citizenship, and receiving a negative answer (R. 74-75), made the following finding of fact (R. 77):

> It is my belief, and I find as a fact, that if in January, 1944, he had been told that the Swiss treaty was superseded by the Selective Service Act and that he must face the choice either of serving in the American Army or waive forever his right to become an American citizen, that he would have elected to do the former. Any other interpretation of these facts is impossible in light of the fact that he had an American wife and three children here.

Judge Kennedy, accordingly, found that petitioner never waived, or, at most, inadvertently waived, his right to naturalization by signing Form DSS 301 (R. 77, 85); overruled the Government's objection to his petition for naturalization; and admitted him to citizenship (R. 4, 85).

On appeal by the Government to the Court of Appeals for the Second Circuit, the order of the

District Court was reversed and the petition for naturalization was directed to be dismissed (R. 94).

ARGUMENT

1. Section 3 (a) of the Selective Training and Service Act of 1940, as amended (*supra*, pp. 2-3), made every male citizen of the United States and "every other male person residing in the United States," within specified age limits, subject to military service in the armed forces of the United States, with the *proviso* that "any citizen or subject of a neutral country" should be relieved from such liability if he made application for such relief, but on condition that any person so applying for relief from service should "thereafter be debarred from becoming a citizen of the United States." Petitioner contends (Pet. 8-9, 13-15) that these provisions of Section 3 (a), as applied to Swiss nationals residing in the United States, conflicted with Article II of the 1850 treaty between this country and Switzerland (*supra*, pp. 3-4), which exempts Swiss residents of this country (and American residents in Switzerland) from "personal military service" in the armed forces of the country of residence.[1]

---

[1] The fact that when he applied for exemption from military service (see *supra*, pp. 6, 8-9) the petitioner's 1942 petition for naturalization was pending before the district court (see *supra*, p. 5) should be noted in connection with the following excerpts from the letter of June 5, 1942, from the Swiss Lega-

But there was no conflict. As the Court of Appeals pointed out (R. 90-91):

> While it is plain enough that the treaty did give [petitioner] immunity from such service, it is equally plain that it did not require him to take advantage of that immunity unless he so desired. * * * [T]he only express condition upon his acceptance of exemption was his liability for whatever pecuniary contributions were exacted from citizens in lieu of military service. This was evidently done to prevent discrimination against citizens and, we think, cannot be treated as an agreement that treaty nationals would be relieved from military service without affecting their status in other respects at all.

---

tion to the Secretary of State, set out at pp. 24-27 of the petition for a writ of certiorari:

> . . . These nationals who have retained their original citizenship, and *who by not applying for naturalization have clearly demonstrated their intention of remaining citizens of their Mother country,* should, therefore, not only by generally recognized International Law, but also by Treaty, be exempt from any personal military service in the armed forces of the country of their residence.
>
> * * * * * *
>
> I have been, therefore, instructed by my Government to approach your Excellency and to request from you to intervene with the appropriate authorities, in order that *at least the Swiss citizens who have not declared their intention to become American citizens* may be unconditionally exempted from the liability for military service. [Italics supplied.]

The treaty is silent on the subject of the acquisition of citizenship by nationals of either country residing in the other and so far as we are presently informed that subject was not considered when the treaty was made. See 3 Hackworth, *Digest of International Law*, pp. 598-612. In our opinion this treaty is without significance in respect to the right of either country to impose what conditions it sees fit upon the admission to citizenship of nationals of the other. It follows that Section 3 (a) of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App. § 303 (a), did not, by granting exemption from military service to all neutral aliens and at the same time debarring all such who applied for it from ever becoming an American citizen, contravene the treaty.

2. Petitioner, however, urges that though he knowingly applied for and received exemption from military service, as permitted him under Section 3 (a) of the Selective Service Act, he should not be held to have incurred the naturalization disability expressly attached to the grant of exemption by the terms of that subsection (Pet. 16-23). However, none of the reasons advanced in support of the contention has merit.

(a) He argues that he obtained exemption from military service, not under the Act, but under the treaty of 1850, and that, since the treaty attaches no naturalization disability to the grant of exemp-

tion, the disability was not incurred (Pet. 16-17). It may be true, as the court below observed (R. 92), that he "*attempted* to obtain his exemption not under the [Act] but under the treaty" [italics supplied], and that "he did so because he wished to become an American citizen as well as to get exemption." But the fact remains that he applied for and obtained exemption under the Act. He signed Selective Service form DSS 301, entitled "Application by Alien for Relief from Military Service," filed it with his local board (R. 17-18), and in due course was classified IV-C—the Selective Service classification for neutral aliens requesting relief from military service (*supra,* p. 3) (R. 53, 54). This form contained, as a *caveat,* the admonition that the applicant would be thereafter debarred from citizenship under "Section 3 (a) of the Selective Training and Service Act of 1940, as amended" (*supra,* pp. 6-7; R. 18). Moreover, in the last analysis, it is immaterial whether relief from military service was accorded petitioner under the Act or under the treaty. For, once he accepted the benefit of the exemption, the Act operated to render him ineligible for future citizenship.

(b) Petitioner further argues (Pet. 20) that he did not "waive" his right to future citizenship,[2]

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[2] See pp. 6-7, *supra,* where it is pointed out that the "revised" DSS 301 form which he signed did not contain, as earlier forms had contained, an express acknowledgment that "the making of this application to be relieved from such lia-

and that his failure explicitly to make such a waiver is somehow relevant. But the Act did not make waiver of future citizenship rights a condition of the naturalization disability it imposed. It imposed that disability, as a matter of law, on all neutral aliens claiming the exemption from service which it authorized. Cf. *Savorgnan* v. *United States,* 338 U. S. 491, 499-502. Consequently, the fact that the application-for-exemption form which petitioner signed did not contain an express acknowledgment that he thereby waived all naturalization rights, and the fact that the Swiss Legation, in its letter to petitioner forwarding copies of that form for him to execute, said "Please note that, through filing of DSS Form 301, revised, you will not waive your right *to apply for* American citizenship papers" (R. 37, italics supplied), are without relevance. Significantly, moreover, the last sentence of the Legation's letter read, "The final decision regarding your naturalization will remain solely with the competent Naturalization Courts" (*ibid.*). The import of this sentence—that non-waiver by petitioner of future naturalization rights would not necessarily prevent his incurrence of the citizenship disability attached by law to his act of seeking exemption—could not have been

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bility [for military service] will debar me from becoming a citizen of the United States"; and that, in lieu of such an express acknowledgment, the "revised" form contained a *caveat* in the terms of Section 3 (a) of the Act.

lost on petitioner, who the record shows was a highly intelligent individual, who carefully sought a way of avoiding military service without at the same time incurring the naturalization disability which Congress attached to the act of applying for exemption.

On this aspect of the case, the court below, correctly in our view, observed (R. 92-93):

> We agree that [petitioner] waived no treaty rights when he applied for exemption. But we do not agree that on the facts here shown the government is estopped from enforcing the statute in this instance, assuming without deciding, that estoppel would, if shown, have such effect. So far as appears, all the government did was to relieve applicants for exemption from formally acknowledging in writing that they understood their application would prevent their becoming citizens and to leave the effect of their application to be decided as the law might require. That the Swiss Legation so understood is shown by the letter it sent [petitioner] advising him that filing the revised form would not be a waiver of his "right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts." This assurance from the Swiss Legation was at most only its own interpretation of the effect of [petitioner's] application for exemption from military service on his right to apply for citizenship. Even if "right to apply for" can be

> stretched to be synonymous with "right to obtain" citizenship that would not bind this government. And at the least it was a caveat that informed [petitioner] that in the end his right to citizenship would be determined by the proper court.

(c) It is urged (Pet. 17-19) that since petitioner was mistaken in thinking that he could apply for and obtain relief from military service as a neutral alien, and at the same time remain eligible for naturalization,[3] he should be relieved of the consequences of his mistake on equitable principles, and should not now be held to have incurred the naturalization disability which Congress attached to his act of applying for military exemption. Such a contention is foreclosed by *Savorgnan* v. *United States,* 338 U. S. 491, 499-502, where this Court held that the voluntary doing of an act by an American citizen, which Congress has declared to be an act of expatriation, is not saved from that legal consequence by the fact that the doer of the act mistakenly believed that that consequence would not attach.[4] Here, as in the expatriation

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[3] The District Court found that if petitioner had realized that "he must face the choice either of serving in the American Army or waive forever his right to become an American citizen, • • • he would have elected to do the former" (*supra*, p. 9), and we shall assume that this finding was correct.

[4] The District Court in the *Savorgnan* case "found as a fact that, at the time of signing each of the documents men-

statute there considered, "There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them" (338 U. S. at 499-500).

3. Finally, petitioner contends that the naturalization disability which he incurred in 1944 by successfully seeking military exemption as a neutral alien failed to survive the expiration of Section 3 (a) of the 1940 Selective Act on March 31, 1947, so that he is now, and was in 1948, when he filed his latest naturalization petition (*supra*, p. 5), eligible for naturalization (Pet. 20-23). This identical contention was rejected in *Benzian* v. *Godwin*, 168 F. 2d 952, 956-957 (C.A. 2), certiorari denied, 335 U. S. 886, and is clearly without merit. The disability imposed by Section 3 (a) was a *personal* disqualification for citizenship, personally incurred by all neutral aliens who took advantage of the exemption provisions of the subsection. It cannot be removed otherwise than by another Act of Congress specifically so providing. It is plain from the terms of Section 3 (a) that Congress intended the naturalization bar to be permanent, and

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tioned [an application for Italian citizenship and an oath of allegiance to the King of Italy], the petitioner, although intending to obtain Italian citizenship, had no intention of endangering her American citizenship or of renouncing her allegiance to the United States" (338 U. S. at 495). Compare the District Court's finding in the instant case, fn. 3, *supra*, p. 16.

not merely for the duration of the life of the Act. This manifest congressional intent is not lightly to be frustrated by an ultra-technical reading of the expiration provisions of the Act (§ 16 (b), see Pet. 4-5). For a more detailed discussion of this point, see the petitioner's reply brief in *McGrath* v. *Kristensen*, No. 34, this Term.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court, and should therefore, it is respectfully submitted, be denied.

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No. 801

In the Supreme Court of the United States

OCTOBER TERM, 1950

PAUL MOSER, PETITIONER
v.
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 301

PAUL MOSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 56–60) is reported at 85 F. Supp. 683. The opinion of the Court of Appeals (R. 61–66) is reported at 182 F. 2d 734.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1950 (R. 67). The petition for a writ of certiorari was filed on September 11, 1950, and was granted on January 2, 1951 (R. 68). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The treaty of 1850 between Switzerland and the United States, provides, *inter alia,* that the citizens of one country residing in the other

shall be free from personal military service. Under Section 3 (a) of the Selective Training and Service Act of 1940, as amended, neutral aliens were exempted from military service upon application in accordance with the prescribed regulations. The Act further provided that such application thereafter debarred the applicant from United States citizenship. The questions presented are:

1. Whether petitioner, a Swiss national who obtained exemption from military service after applying for it on the prescribed Selective Service form, is debarred from becoming a citizen of the United States, as provided by the Selective Training and Service Act, or whether the treaty of 1850 precludes a denial of naturalization as the consequence of a claim to military exemption.

2. Whether, under the circumstances of this case, the Government was estopped from asserting petitioner's debarment from naturalization.

3. Whether the debarment from naturalization, incurred by claim of exemption from military service, was terminated by expiration of the effective period of the Selective Service Act.

STATUTE, REGULATION AND TREATY PROVISIONS INVOLVED

The Selective Training and Service Act of September 16, 1940, c. 720, 54 Stat. 885, *et seq.*, as amended by the Act of December 20, 1941, c. 602, §§ 2, 4–6, 55 Stat. 844, 845, the Act of

May 9, 1945, c. 112, § 1, 59 Stat. 166, the Act of May 14, 1946, c. 253, § 1, 60 Stat. 181, and the Act of June 29, 1946, c. 522, § 7, 60 Stat. 342, 50 U. S. C. App. 303 (a), 305 (a), 316 (a) and (b), provided in pertinent part as follows:

> SEC. 3 [50 U. S. C. App. 303]. (a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States [within specified age limits] shall be liable for training and service in the land or naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *.
>
> * * * * *
>
> SEC. 5 [50 U. S. C. App. 305]. (a) Commissioned officers, [various other similar groups] and persons in other categories to be specified by the President, residing in the United States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States, shall not be required

to be registered * * * and shall be relieved from liability for training and service * * *.

* * * * *

SEC. 16 [50 U. S. C. App. 316]. (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) The provisions of the third sentence of section 3 (a) of this Act shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act, except the provisions of sections 3 (b), 3 (c), 3 (d), 8 and 16 (b), and the fourth and fifth provisos of the second sentence of section 3 (a), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date. * * *

Selective Service Regulation 622.43 (32 C. F. R. [1943 Cum. Supp] 622.43) provided in pertinent part:

§ 622.43 *Class* IV–C: *Neutral aliens requesting relief from training and service* * * *.

* * * * *

(b) When an alien registrant who is a citizen or subject of a neutral country (see

§ 601.2) at any time prior to his induction into the land or naval forces of the United States files with his local board an Application by Alien for Relief from Military Service (Form 301) executed in duplicate, he shall be placed in class IV–C. * * *

Articles I and II of the Convention of Friendship, Reciprocal Establishments, Commerce, &c., between the United States and the Swiss Confederation, concluded November 25, 1850, and proclaimed November 9, 1855 (11 Stat. 587–589), provide in pertinent part:

ARTICLE I

The citizens of the United States of America and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties. The citizens of the United States and the citizens of Switzerland, as well as the members of their families, subject to the constitutional and legal provisions aforesaid, and yielding obedience to the laws, regulations, and usages of the country wherein they reside, shall be at liberty to come, go, sojourn temporarily, domiciliate or establish themselves permanently, * * * to acquire, possess, and alienate therein property, (as is explained in Article V;) to manage their affairs; to exercise their pro-

fession, their industry and their commerce; to have establishments; to possess warehouses; to consign their products and their merchandise, and to sell them by wholesale or retail, either by themselves or by such brokers or other agents as they may think proper; they shall have free access to the tribunals * * *. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above-mentioned rights, than shall be imposed upon citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject.

The foregoing privileges, however, shall not extend to the exercize of political rights, nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors.

ARTICLE II

The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.

No higher impost, under whatever name, shall be exacted from the citizens of one of the two countries, residing or established

in the other, than shall be levied upon citizens of the country in which they reside, nor any contribution whatsoever to which the latter shall not be liable.

In case of war, or of expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside with respect to indemnities for damages they may have sustained.

STATEMENT

The petitioner applied for United States citizenship under Section 310 (b) of the Nationality Act of 1940 (8 U. S. C. 710 (b)) (R. 7–12). At the hearing in the District Court for the Eastern District of New York on March 10 and June 9, 1949 (R. 41–55), the Immigration and Naturalization Service of the United States objected on the ground that petitioner was debarred from becoming a citizen of the United States by virtue of the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended, in that he had applied for exemption from military service during World War II as a neutral alien (R. 13, 41–42). The trial judge ordered petitioner admitted to citizenship (R. 2). On appeal to the Court of Appeals for the Second Circuit, the district court's order was reversed and the petition for naturalization dismissed (R. 67).

A. THE PETITIONER'S ATTEMPTS AT NATURALIZATION

The petitioner, a native and a national of Switzerland, first entered the United States as a nonimmigrant visitor on July 6, 1937, when 25 years of age (R. 9, 23–24). On December 25, 1937, he departed for Canada and was readmitted to the United States on December 29, 1937, as an immigrant for lawful permanent residence (R. 7, 20, 23–24). On March 9, 1938, he filed a declaration of intention to become a citizen (No. 411089), stating, *inter alia* (R. 18A), that the date of his entry into the United States was December 29, 1937, and that his occupation was that of civil engineer.

On May 11, 1940, petitioner left the United States for Switzerland for the purpose of rejoining his unit in the Swiss Army, in which he held a reserve commission (R. 20, 24, 56). He returned to this country in October 1940, reentering, according to the Court of Appeals (R. 61), as a nonquota immigrant returning to an unrelinquished domicile.[1]

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[1] Confirmation of the Court of Appeals' description of petitioner's re-entry is found in the fact that on the papers he filed in the various naturalization proceedings, his original entry was stated to have taken place, not in October 1940, but on December 29, 1937 (R. 9, 11, 51).

Petitioner seems at one time to have been told (R. 46) that his declaration of intention had lapsed because of his return to Switzerland in 1940, but the central office of the Immigration and Naturalization Service ruled otherwise (R. 51). See also note 3, p. 11, *infra*.

On October 19, 1940, petitioner married a United States citizen in the City of New York (R. 37). On October 30, 1940 (R. 38), he filed an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization (No. 458512) (R. 23–24). In this form, he again stated that December 29, 1937, was the date of his arrival in the United States as an immigrant (R. 23). This form included the question, "If necessary are you willing to take up arms in defense of this country?", to which petitioner answered "Yes." It included the further question, "Did you claim exemption from the draft during the 2 World War because you were an alien?", to which petitioner answered, "No—not here" (R. 24).

About a year and a half later, on March 27, 1942, Moser filed a petition for naturalization (No. 330801). As the spouse of an American citizen, he was free, under the provisions of the Nationality Act of 1940 (8 U. S. C. 710 (b)) from the five year residence requirement (three being sufficient) and the requirement of a declaration of intention. He alleged, *inter alia,* entry into the United States on December 29, 1937, and continuous residence since that date (R. 3–4).

On February 5, 1943, during an interrogation by a naturalization examiner in connection with this petition for naturalization (No. 330801) filed in 1942 (R. 3–4), petitioner stated that when he left the United States in 1940, it was his full

intention to return. Consequently, the central office of the Immigration and Naturalization Service in Washington ruled that there was no break in the continuity of petitioner's residence in the United States and authorized the continuance of the petition for naturalization (R. 51).[2]

On June 5, 1944, petitioner was notified to appear with respect to his pending petition for naturalization. He was again notified on January 29, March 19, and April 30, 1945, but on each occasion he failed to be present (R. 6, 51.) Thereafter, on July 5, 1945, the petition for naturalization was dismissed by the court for "lack of prosecution" (R. 6, 11, 51).

On November 10, 1947, petitioner filed a second "Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization" in the United States District Court for the Eastern District of New York (R. 7). On March 31, 1948, he filed the petition for naturalization which gave rise to this case (N. 458512). He did so on the basis of his marriage to a citizen of the United States (R. 11), again obtaining the benefits of the provisions of the Nationality Act of 1940 (8 U. S. C. 710 (b)), including freedom from the requirement of a declaration of

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[2] It was between the foregoing date, February 5, 1943, and the date next mentioned, June 5, 1944, that petitioner, as will be seen, filed his claim for military exemption on February 26, 1944 (R. 14–15), the Swiss legation having decided that he was a nondeclarant (R. 31). See *infra*, pp. 16–19.

intention. At the time of this filing, he was given a preliminary naturalization examination in the course of which the examiner made a correction on the "Statement of Facts to be used in Making and Filing My Petition for Naturalization" (R. 9) by changing the date shown for his lawful entry for permanent residence in the United States from October 11, 1940, to December 29, 1937, the latter being the date of his entry as a quota immigrant (R. 9, 50).[3]

B. THE PETITIONER'S CLAIM TO MILITARY EXEMPTION

On October 19, 1940, petitioner registered under the Selective Training and Service Act of 1940. On January 15, 1941, he executed a Selective Service Questionnaire (DSS Form 40) (R. 33–40, 13), wherein he stated, *inter alia*, that he had filed a declaration of intention to become a citizen, in March 1938, and a petition for naturalization in October 1940 (R. 38). At this time, the liability for military service in the case of neutral aliens applied only to declarant aliens (54 Stat. 885). He requested classification in "Class III or IV" for the following reasons: "1. Expecting

[3] The continuity of Moser's residence for naturalization purposes was not broken by his absence from May 11, 1940, to October 11, 1940, as was evidenced by the fact that he was re-admitted as a nonquota immigrant (see *supra*, note 1, p. 8)—"an immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad." Section 4 (b), Immigration Act of 1924; 8 U. S. C. 204 (b).

a child. 2. Citizen of Switzerland. 3. Approx. 2 years in the armed forces of Switzerland 1st Lieut. Engineers" (R. 39). On March 4, 1941, petitioner was classified Class III–A by his local draft board, a classification based on dependency (R. 40).

On December 20, 1941, the Selective Service Act was amended to subject nondeclarant neutral aliens to liability for military service (only declarants having theretofore been liable), and to provide the exemption for neutral aliens and debarment from citizenship in the event of application for such exemption, as set forth on p. 3, *supra*. On June 5, 1942, the Minister of Switzerland, in a letter to the Secretary of State (Petitioner's Br. 33–36), objected to the amendment on behalf of various Swiss nationals (the petitioner not yet being involved), as being contrary to "the text and the spirit" of the Treaty of 1850 and to "principles" of "international law," and requested the Secretary's intervention with the appropriate authorities on behalf of "at least the Swiss citizens who have not declared their intention to become American citizens", so that they might be "unconditionally exempted from the liability for military service." The letter of the Swiss Minister was acknowledged on July 6, 1942, in a letter signed by A. A. Berle, Jr. for the Secretary of State (Petitioner's Br. 36–37), assuring the Swiss Minister that it was not the intention of the Government to conscript Swiss nationals tem-

porarily in the United States, and closing with the statement:

> In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above [the treaty of 1850 and a 1937 convention relating to dual citizenship cases]. * * *

In the negotiations that followed, the Selective Service System refused to acknowledge a right to exemption on treaty grounds and restricted the exemption to that provided under Section 3 (a) of the Selective Training and Service Act. However, "In order that Swiss citizens might claim the exemption and reserve their position as to the effect of Section 3 (a) of the Selective Service Act on their right to become citizens, Form 301 [Application by Alien for Relief from Military Service] was revised * * *." The Swiss legation was "informed on numerous occasions by the Department [of State] that the effect of a claim to exemption from military service on the Swiss citizen's right to become an American citizen can only be determined definitely by the courts. * * *" (Appendix, *infra*, p. A20 [MS. Department of State, file 811.111 Lavanchy, from R. T. Yingling to Visa Division, Mar. 21, 1946]; Appendix, *infra*, pp.

A32–A33, A–35–A36, [Letters of Selective Service System, March 5, 1943, March 6, 1943]).

Form 301, revised March 16, 1943, and effective April 13, 1943 (8 F. R. 4819),[4] differed from the preceding form used in that there was deleted the statement that the application was made "under the Selective Training and Service Act of 1940, as amended, in accordance with the Act of Congress, approved December 20, 1941." Also deleted were the statement, "I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States", and the provision for surrender by a declarant applicant of the triplicate copy of his declaration (R. 16–17). The revised form (R. 14–15), however, bore a printed *caveat* below the signature, as follows (R. 15):

> Section 3 (a) of the Selective Training and Service Act of 1940, as amended, provides in part "That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by

[4] A revision dated January 2, 1943, and effective February 5, 1943 (8 F. R. 1709), was never used. (Appendix, *infra*, pp. A2, A6–A7 [Letter of Selective Service System, February 13, 1951].) See also Appendix, *infra*, p. A34.

> the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

A half year later, the Selective Service Regulations were amended (8 F. R. 13672, effective Oct. 1, 1943), deleting the former specific statement appearing in Sec. 622.43 (c) (32 C. F. R. [1941 Supp.] 622.43 (c)) that when a neutral alien files a Form 301 he is thereafter barred from becoming a citizen of the United States.[5]

On January 11, 1944, petitioner was reclassified into Class I–A as being available for military service (R. 40), in which classification he was continued on January 20, 1944, after a hearing, in which he stated that he desired to take an appeal (R. 40).

On January 24, 1944, petitioner advised the Consulate General of Switzerland at New York, by letter (R. 20), that he had been given a I–A classification by his local board and wished "to be reclassified and deferred from service in the armed forces of the United States as a neutral alien." He stated that he was an "Alien without first papers for American citizenship," and stated, further: "On March 27, 1942 I filed in Brooklyn Court for final citizenship. After a thorough examination of my papers, the citizenship was denied for the reason that when I left

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[5] For further details concerning the administrative practices summarized herein, see Appendix, *infra*, pp. A1, *et seq.*

for Switzerland 'without a re-entry permit' I lost all rights to my first papers." He stated that he had been informed by the "chief examiner" to file another application for naturalization but had taken no action. He asked whether he was to handle the appeal or whether the Swiss Legation would take up the matter. By letter dated January 25, 1944 (R. 21), petitioner furnished information to the Legation of Switzerland in Washington, to the effect that he had entered the United States with an "Immigration quota visa on October 11, 1940," and that since his 1940 entry he had "not obtained nor application filled out for 'first papers'."

On January 27, 1944, the Swiss Legation in Washington, in a letter to the Department of State, requested that petitioner as "a non-declarant Swiss citizen" be given an "unconditional release from the liability for military service in conformity with Article II of the Treaty of * * * 1850" (R. 31). The Department of State acknowledged the request and advised that it had been "referred to the appropriate agency of the Government for investigation" (R. 31–32). The Department of State forwarded the request to the Selective Service System (Appendix, *infra*, p. A57), which replied that the local draft board had been instructed to inform petitioner that he might obtain a revised form 301 from the Swiss Legation (Appendix, *infra*, p. A58).

On January 29, 1944, petitioner wrote to his local board, stating that he had taken the necessary steps with the Legation of Switzerland in Washington to be "released unconditionally" from liability for military service, "under the provisions of Article II" of the treaty and that he would "in due time execute before your Local Board 'Form 301 as amended'" (R. 30).

On February 3, 1944, the Consul General of Switzerland wrote to petitioner, referring to his "recent conversation regarding your application for unconditional release from the liability for military service" and informing petitioner that, in the opinion of the Swiss Legation, he "should be considered as a non-declarant Swiss alien," and that his application had been submitted to the Department of State for further action (R. 19).

The National Headquarters of the Selective Service System, on February 12, 1944, instructed the Director of Selective Service for the City of New York that petitioner, as a neutral alien, had claimed exemption from military service under the terms of the Swiss treaty and that he was entitled to file an application for exemption on either the "old Form 301 (16–26414–1)" or on a "revised Form 301 (16–33666–1)," either of which "may be used by the local boards in accordance with Section 622.43 of the Regulations" (R. 29). Six days later, the Legation of Switzerland informed petitioner, by letter (R. 30–31), that, in accordance with the terms of the Treaty

of 1850, it had requested the Department of State to exempt petitioner. The letter continued as follows:

> We are forwarding to you, herewith, two copies of DSS Form 301, *revised,* which kindly execute and file immediately with your Local Board. This action on your part is necessary in order to complete the exemption procedure; your Local Board, in accordance with Selective Service regulations, as amended, will then classify you in Class IV–C.
>
> Please note that, through filing of DSS Form 301, revised, you will not waive your right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts.

The Secretary of State informed the Swiss Minister on February 25, 1944, that petitioner's local board had been instructed "to inform him that he may obtain from the Legation an Application by Alien for Relief from Military Service, DSS Form 301, which each such registrant is required to execute and file with his local board." (Appendix, *infra,* p. A59.)

On February 26, 1944, petitioner executed and filed the Form DSS 301, Revised, entitled, "Application by Alien for Relief from Military Service" (R. 14–15), in which he applied "for relief from liability for training and service in the land or naval forces of the United States," and stated,

"I have not declared my intention to become a citizen of the United States." The form, as heretofore noted (pp. 14–15), contained a footnote setting forth the statutory proviso that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." The Local Board thereupon placed petitioner in Class IV–C (R. 40, 41), in which exempt classification he remained for the remainder of the war and until reclassification as over-age on October 9, 1945, (R. 40, 41).

C. THE PROCEEDINGS IN THE COURTS BELOW

The petition for naturalization (No. 458512) came on for final hearing in the District Court on March 10 and June 9, 1949 (R. 41–55). The District Judge found that petitioner would have chosen military service if "he had been told that the Swiss treaty was superseded by the Selective Service Act and that he must face the choice either of serving in the Army or waive forever his right to become an American citizen * * *" (R. 55); he concluded that petitioner never waived his right to naturalization by signing DSS Form 301 (R. 55, 60). Consequently, the District Judge overruled the Government's objections to Moser's petition for naturalization; and on July 21, 1949, entered an order admitting him to citizenship (R. 2). This order was reversed upon appeal to the Court of Appeals for the Second Circuit (R. 67) upon the grounds, in substance,

that the treaty was silent as to acquisition of citizenship by nationals of either country, that the Congressional provision for debarment accordingly was not in contravention of the treaty, that the language of the Selective Training and Service Act was not limited to non-treaty aliens, and that (without deciding whether estoppel would be effective as a matter of law) no factual basis for estoppel had been established in the limited actions and statements of the government agencies (R. 61–66).

SUMMARY OF ARGUMENT

Two questions are discussed by way of introduction to the argument. It is pointed out that while not necessarily relevant to the questions presented for decision, the petitioner was literally a "declarant" alien when he sought military exemption, and certainly was a "declarant" in all but the most technical sense since he had a petition for naturalization pending at the time.

The suggestion is then made that since the treaty of 1850 and the Selective Training and Service Act of 1940, as amended, are plainly not in conflict, it is unnecessary to reach the delicate and far-reaching questions that would arise if there were a conflict.

I

A. The text of the treaty of 1850 between the United States and Switzerland, grants a right

ice in the other. It does not deal with the right of nationals of either country to become citizens of the other. The attaching of a debarment from citizenship as a consequence of exercising the exemption does not render the right to be free from military service nugatory, nor does it infringe on any rights granted by the treaty. The treaty specifically, and, in terms, excepts "political rights" from its catalogue of rights conferred. That specific exception and the saving, by the treaty, of Federal "Constitutional" provisions, requires the conclusion that the signatories did not intend to intrude in any way on the constitutional power of Congress to prescribe qualifications for American citizenship.

B. The history of the debarment provision in the Selective Training and Service Act of 1940, as amended, makes it clear that debarment from citizenship was early conceived of not as a penalty attached to a claim of military exemption but, rather, as the result of a Congressional conviction that resident aliens who chose not to serve had demonstrated a lack of attachment to this nation warranting denial of the privilege of naturalization.

From the Civil War to the present, Congress and the executive branch of our Government have shared the conviction that treaties like those here involved do not preclude debarment from citizenship as a consequence of a claim by a resident alien to military exemption. The problem of asserted conflict was squarely faced by the Congress,

in 1918, and the view clearly expressed that the question of eligibility for naturalization was outside the scope of such treaties. This view was again taken in 1941, and later, by the President, The Selective Service System, and the Department of State, and acted upon by the Congress in enacting the statutory provision here in question.

II

Since the Selective Training and Service Act of 1940, as amended, requires that a claim of a neutral alien to military exemption be honored, and that is all that the treaty of 1850 requires, the statutory provision for debarment from citizenship is not in derogation of any right conferred by the treaty, and it need not be construed as inapplicable to treaty aliens in order to bring the statute and treaty into accord.

Moreover, Section 3 (a) of the Selective Training and Service Act of 1940, as amended, does not in terms exclude treaty aliens from its debarment provisions, nor can its language be ignored and such an exclusion inferred.

A. The debarment provisions in the various selective service laws were enacted pursuant to this Government's desire to bring its conscription laws into line with treaties like that of 1850 and to remove conflicts with conventional as well as customary international law that had arisen as a result of earlier provisions of law unconditionally drafting aliens, even those freed under treaty provisions from the duty to serve. Hence such

statutory provisions cannot be read as inapplicable to those, like petitioner, in recognition of whose rights they were enacted.

B. Since the treaty right to be free from military service is in part declaratory of much the same right of neutral aliens under the law of nations, construction of Section 3 (a) to make its debarment provision inapplicable to those having a pre-existing right to freedom from military service would tend to nullify that provision entirely. Such a consequence is, of course, to be shunned.

III

Petitioner's invocation of a unique doctrine of "citizenship by estoppel" must be rejected not only because there is no legal warrant for it but also because the facts in this case in any event afford no basis for an estoppel. Petitioner's hope that his claim to exemption would not lead to debarment from citizenship was his own; neither the Selective Service System, nor the State Department, nor even the Swiss Consulate gave him any assurance that the consequence of debarment could be avoided. He was advised merely that the matter could be finally resolved only by the courts.

The finding of the district court in this case that petitioner would have chosen military service if he had known that a claim to exemption would result in his debarment from citizenship can no more help petitioner than did a similar finding

aid the petitioner in *Savorgnan* v. *United States*, 338 U. S. 491. Petitioner is bound by the legal consequence of the claim to exemption which he knowingly made.

IV

The termination of the effective period of the Selective Service Act of 1940, on March 31, 1947, did not result in removal of the debarment from citizenship from those who had theretofore claimed military exemption. The Act provided that those who sought exemption should be debarred "thereafter." It could scarcely have been the purpose of Congress to work a debarment only while the war lasted, and thus permit aliens simply to postpone naturalization until application for citizenship could be safely made. The history of the Act, the subsequent incorporation of the debarment in the 1945 amendment to the permanent Immigration Act of 1924, and the saving provisions of 1 U. S. C., Supp. III, 109, evince a clear Congressional purpose that the debarment should continue unless and until it is specifically removed by Act of Congress.

ARGUMENT

Introduction.—Two aspects of this case should be discussed at the outset because while they bear on the issues involved and recurrently suggest themselves in various phases of the Argument, they are probably collateral in the sense that they

are not necessarily presented for decision in this case.

A. *The question whether petitioner was a "declarant" alien when he applied for military exemption.*—As has been briefly noted (*supra*, p. 12) and as the Argument will show in more detail, Congress has, in the various "draft" laws enacted since 1860, often distinguished between "declarant" and "non-declarant" aliens. But neither the treaty of 1850 with which we are here concerned nor the applicable statutory provision (Section 3 (a) of the Selective Training and Service Act in the version here applicable and set out *supra*, p. 3) distinguishes between "declarant" and "non-declarant" aliens.

The Government is consequently of the view that the question of petitioner's status in this respect is probably irrelevant to this case. But since that distinction has been drawn so often in the field with which we are concerned, and may conceivably be deemed relevant, it is desirable to make clear and explicit the Government's position that petitioner was a "declarant" when, on February 26, 1944 (R. 14–15), he filed his application for relief from military service.

It is not suggested that when, on January 24, 1944, petitioner advised the Consulate General of Switzerland, by letter, that he was an "Alien without first papers for American citizenship" (R. 20–21) he was guilty of a purposeful misrepresentation. See R. 52–53, 58, 63. But from the

facts appearing in the Statement, *supra*, pp. 8–11, the Government believes it to be clear that petitioner was in fact a declarant alien, having filed a "Declaration of Intention" on March 9, 1938 (R. 18A), which was deemed to be effective by the central office of the Immigration and Naturalization Service (R. 51) notwithstanding petitioner's return to Switzerland in 1940 (R. 20, 24, 56).[6]

In any event, only the most technical reading of the term "declarant" could convert petitioner into a "non-declarant". For, whatever the formal status of his "Declaration of Intention", he was, beginning on March 27, 1942 (R. 3–4), a petitioner for naturalization, and that petition was not dismissed until July 5, 1945 (R. 6, 11, 51), more than a year after he claimed military exemption (R. 14–15).

B. *The question whether, if the Selective Training and Service Act of 1940 be read as in conflict*

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[6] The petition for naturalization, filed by Moser on March 27, 1942 (R. 3–4), and ultimately dismissed for "lack of prosecution" (R. 6, 11, 51), could only have been processed on the assumption that his declaration of intention had not been invalidated by his return to Switzerland. For while, as the spouse of an American citizen, the declaration could be dispensed with under 8 U. S. C. 710 (b), a showing of three years' continued residence "immediately preceding the filing of the petition" was still required. And that residence requirement could not be fulfilled in 1942 if there had been deemed to be a break in the continuity of his residence between May and October 1940, while he was in Switzerland. See also notes 1 and 3, *supra*, pp. 8, 11.

with the treaty of 1850, the later statute overrides the earlier treaty.—There can be no doubt of the Constitutional power of the Chief Executive or the Congress to formulate a national policy or enact legislation inconsistent, in whole or in part, with the enforcement of a treaty. *Clark* v. *Allen,* 331 U. S. 503, 508–509; *Pigeon River Co.* v. *Cox,* 291 U. S. 138, 160; *Whitney* v. *Robertson,* 124 U. S. 190; *Head Money Cases,* 112 U. S. 580; *Cherokee Tobacco,* 11 Wall. 616, 621. And when such inconsistent legislation is enacted, it is the duty of the courts to follow the Congressional mandate, leaving the question of treaty status to international negotiation between the interested states. See *Botiller* v. *Dominguez,* 130 U. S. 238, 247.

However, as stated for this Court by Mr. Justice Brandeis in *Cook* v. *United States,* 288 U. S. 102, 120: "A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed." See also *Chew Heong* v. *United States,* 112 U. S. 536; *United States* v. *Payne,* 264 U. S. 446; *Cheung Sum Shee* v. *Nagle,* 268 U. S. 336; 5 Hackworth, *Digest of International Law,* Sec. 489; 2 Hyde, *International Law,* p. 1464. And the cogency of this doctrine, thus frequently asserted and applied in the past, has increased in recent years.

The concern and participation of the United States in world affairs has grown notably, particularly since World War II. This has been especially true in the field of multilateral treaties and public international organizations. There has, of course, been no diminution but rather an increase in the bilateral treaty and international agreement relationships between the United States and other countries. A truly striking development in American foreign relations, however, has occurred through United States participation in the United Nations and other international organizations. This development reflects the recognition of greatly increased interdependence among nations, and their need to engage in close and working cooperation on many matters which have become international in significance and are now so recognized.

This cooperation, formally based on treaties and other international agreements, is expressed in the work of the organs of the United Nations, of its numerous "specialized agencies", and of other international organizations in which the United States participates. Action by the United States which has the effect of modifying or abrogating, unilaterally, these relationships and arrangements is of far-reaching importance and a matter of considerable national as well as international concern. Since in the great majority of instances the Congress (through appropriations legislation and the approval of

international agreements by joint resolution—or the Senate through treaty ratification) has participated in entering upon and implementing these international relationships and arrangements, Congressional modification or abrogation of them should not be held to take place in the absence of a clearly expressed purpose of Congress to do so.

It is submitted that the Congress, in considering new legislation is aware of the international obligations of the United States and certainly should not be presumed to act without scrupulous regard for them. In some cases, of course, the Congress may determine that new legislation should, in one or more respects, override the law of the land embodied in existing international obligations. It is to be expected in such cases that careful consideration would be given to the conflict in question, and that a decision would be reached after a careful canvass of the factors involved. Such a process of legislative consideration would leave behind clear evidence of the Congressional purpose—available for use in subsequent construction of the new legislation. But where such consideration does not take place, or where no Congressional purpose to modify or abrogate emerges and is clearly expressed, it is submitted that the courts should not hold that a prior international obligation is modified or abrogated by a subsequent Congressional enactment.

Thus the question, whether if there were a con-

flict between Section 3 (a) of the Selective Service Act and the treaty of 1850, the later act would supersede the earlier treaty, as the court below indicated in passing (R. 65), is an extremely delicate and difficult one, and every effort should be made to avoid it. Since we are convinced that there is no conflict between the statute and the treaty, we do not believe that any questions which which arise only if a conflict be assumed are presented in this case. And we shall now proceed to set out the materials from which the conclusion that there is no conflict is, we submit, compelled.

I

THE TREATY OF 1850 BETWEEN THE UNITED STATES AND SWITZERLAND DOES NOT PRECLUDE DEBARMENT FROM CITIZENSHIP AS A CONSEQUENCE OF A CLAIM TO EXEMPTION FROM MILITARY SERVICE

A. THE TEXT OF THE TREATY REVEALS THAT THE SIGNATORY NATIONS WERE NOT CONCERNED WITH NATURALIZATION OF THEIR NATIONALS

The treaty here in question, concluded on November 25, 1850, and proclaimed on November 9, 1855,[7] provides in its Article II that:

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but

[7] 11 Stat. 587, 595. During the intervening time further negotiations resulted in certain modifications of provisions concerning real estate and other matters not pertinent to the questions here involved. 5 Miller, *Treaties and Other International Acts of the United States*, 876–898, 900–904.

> they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.[8]
>
> * * * * *

On its face, and with but one exception to be shortly discussed, this provision reflects no concern whatever with the consequences that might be attached to the freedom from military service that is guaranteed. It is to be assumed, of course, that the signatory powers did not contemplate conditions on exemption from military service which would render that grant nugatory. Thus, if the consequence of a claim to military exemption were, to suggest an extreme case, the imposition of the death sentence on the claimant,

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[8] The United States has similar treaties, containing reciprocal military exemption provisions (in addition to that with Switzerland), as follows: Argentina (10 Stat. 1005, 1009), China (63 Stat. Pt. II), Costa Rica (10 Stat. 916, 921), Ireland (Dept. of State Treaties and Other Int'l Acts Series, 2155), Italy (63 Stat. Pt. II), Paraguay (12 Stat. 1091, 1096), Thailand (53 Stat. 1731, 1732), Spain (33 Stat. 2105, 2108), and Yugoslavia (22 Stat. 963, 964). The treaties with China, Ireland, and Italy were concluded after enactment of the Selective Training and Service Act of 1940. In addition, the United States has treaties with Honduras (45 Stat. 2618, 2622), El Salvador (46 Stat. 2817, 2821), Norway (47 Stat. 2135, 2139), Estonia (44 Stat. 2379, 2381), Germany (44 Stat. 2132), Hungary (44 Stat. 2441, 2445), Latvia (45 Stat. 2641, 2643), Liberia (54 Stat. 1739, 1742), and Austria (47 Stat. 1876, 1880), providing for the drafting, in the event of war, of declarant aliens remaining in residence in the other country.

the right to be free from military service would be converted into no right at all.

But short of such measures, and in the absence of any contemporary collateral record warranting the implication of a right to citizenship in the nation in which military service is refused (see 5 Miller, *Treaties and other International Acts of the United States*, pp. 845–904; and see R. 64), the text of the treaty as a whole must be examined and the question considered whether debarment from citizenship as a consequence of military exemption is precluded.

The underlying materials which are available make it clear that Article II of the treaty, with which we are particularly concerned, "is only a development and an application of the principle of equality set forth at the head of the treaty * * *",[9] *i. e.* in Article I. Article I contains, in the main, an extensive listing of reciprocal rights of aliens to "sojourn temporarily, domiciliate or establish themselves permanently", to manage their affairs, exercise their profession, and the like. And so, it may be assumed again, that denial of any such specifically granted rights as a consequence of freedom from

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[9] The excerpt above quoted is from the message of the Swiss Federal Council of the Confederation to the Federal Assembly, December 3, 1850, and the views there expressed reflected as well those of the Special Agent of the United States who negotiated the original Convention. See 5 Miller, *Treaties and other International Acts of the United States*, pp. 867, 864. And see note 12 *infra*, pp. 36–37.

military service would be in contravention of the treaty.

But the treaty confers no right to naturalization. Indeed, Article I goes on specifically to provide (11 Stat. 587, 588) that:

> The foregoing privileges, however, *shall not extend to the exercise of political rights,* nor to a participation in the property of communities, corporations, or institutions of which the citizens of one party, established in the other, shall not have become members or co-proprietors. [Italics supplied.]

This denial of "political rights", which would probably be properly implied even if it were not made express,[10] certainly is in the face of petitioner's present assertion that the treaty of 1850 takes from its signatory powers the right to deny the "political right" of citizenship to those aliens who refuse military service. Cf. Bouchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 64–65.

Confirmation for this conclusion appears in another provision of Article I of the treaty of 1850—that which provides for the admission and treatment of the citizens of the signatory powers

[10] Secretary of State Daniel Webster wrote to the President, on January 21, 1851: "This 1st article is essentially the same as the 1st article in the Convention now subsisting between the United States and the Swiss Confederation, concluded in May 1847 * * *." 5 Miller, *op. cit.*, p. 879. However, the 1847 convention did not contain the quoted reservation with respect to political rights. 5 Miller, *op. cit.*, pp. 169–170.

> upon a footing of reciprocal equality in the two countries, *where such admission and treatment shall not conflict with the constitutional or legal provisions, as well federal as State and cantonal, of the contracting parties.* [Italics supplied.]

By its plain terms, this provision brings into play Section 8, Article I of our Constitution, which gives to Congress the power "To establish a uniform Rule of Naturalization". That power, it is well settled, is a plenary one; the qualifications for citizenship are for Congress to prescribe; it can condition the offer of the privilege as it sees fit. *Maney* v. *United States,* 278 U. S. 17, 22; *Zartarian* v. *Billings,* 204 U. S. 170, 175; *United States* v. *Ginsberg,* 243 U. S. 472, 475; *Luria* v. *United States,* 231 U. S. 9, 23. In the light of the absence in the treaty of anything specifically foreclosing debarment from citizenship as a consequence of a claim to military exemption and its express saving of "constitutional * * * provisions", the treaty should not be read as a constraint on Congress to make exceptions to its long-standing conviction that one who, like petitioner (R. 3–4), desired citizenship in a free republic must be prepared if need be to fight in defense of his country's freedom. See *infra,* pp. 41, 50–57, 70. And cf. *United States* v. *Schwimmer,* 279 U. S. 644; *United States* v. *Macintosh,* 283 U. S. 605; compare *Girouard* v. *United States,* 328 U. S. 61, with Section 29 of the Internal Security Act of 1950, Pub. L. No. 831, 81st Cong.,

2d Sess. Any discrimination worked by debarring from citizenship neutral aliens claiming military exemption is, if anything, to their advantage. For, under the Selective Training and Service Act of 1940, as amended, citizens, nationals of cobelligerent nations, enemy aliens, and neutral aliens not claiming exemption, all may be compelled to serve, the sole alternative being criminal punishment. See 50 U. S. C. App. 303 (a) and Fourth Report of the Director of Selective Service (1948) pp. 206–209. Neutral aliens who, like petitioner, claimed exemption lost nothing but their right to be citizens of the nation they chose not to serve.[11]

The only reference in the treaty of 1850 to consequences that might be attached to freedom from

[11] The provision of a Swiss criminal statute (Article 94, Swiss Military Criminal Code, June 13, 1927; Nouveau Manuel du Droit Suisse, Zurich, 1946–1947, vol. 2, p. 632), cited in the Petitioner's brief (p. 5, note 1) to the effect that any Swiss citizen "who, without the permission of the Federal Council enters foreign military service shall be punished by imprisonment," is not relevant to the issue involved herein. Switzerland is one of the countries which recognizes dual citizenship (MS Dept. of State, file 354.117 Kienast, Ernest 4/51/68, 3 Hackworth, *Dig. of International Law*, pp. 366–367), and a Swiss citizen can never divest himself of such citizenship even if naturalized in another country. Consequently, the Swiss criminal statute would proscribe a Swiss citizen from service in the United States armed forces even after he had acquired United States citizenship. Nevertheless, there is no doubt that the possibility of such a consequence could not operate to relieve from service in our armed forces, in time of war, a Swiss national, otherwise qualified, who had already acquired United States citizenship. See Appendix, *infra*, pp. A54–A55.

military service is the provision, in Article II (*supra*, p. 6) that nationals of one power, exempted by the other, should remain liable "to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service." There is no suggestion that such liability was the sole consequence to be attached to military exemption; it appears, rather, that aliens excused from service were specifically expected, for example, to pay general war taxes,[12] from which those who claimed no exemption were, in fact, relieved in whole or in part. See, *e. g.*, Internal Revenue Code, Sec. 22 (b) (13), 26 U. S. C. 22 (b) (13).

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[12] The following appears in the message of the Federal Council of the Confederation to the Federal Assembly, December 3, 1850 (5 Miller, *op. cit.* 867):

"Article 2 regulates that which concerns taxes and various contributions * * *.

Article 2 is only a development and an application of the principle of equality set forth at the head of the treaty * * *; but as other consequences of the principle were brought out, it was not possible to pass over in silence so essential a point as that of the taxes * * *.

Furthermore, the difficulties which some Cantons have had with France and Sardinia on the subject of pecuniary contributions required in compensation for exemption from personal military service have rendered perceptible the necessity of a categorical explanation by stipulating [here is quoted the opening paragraph of the article]. This explanation is all the more proper because compensations of that kind are not known in the United States of America.

"It is understood that those contributions will not dispense the citizens of one of the two countries residing or estab-

The provision just referred to demonstrates, as well, that the exemption from military service was intended to be a strictly limited right in that it carried with it no immunity from the pecuniary contributions levied on exemptions from military service. It is likely that "pecuniary or material contributions" as a consequence of military exemption was specifically included partly because it was a then familiar consequence; but the treaty is not to be read statically to preclude consequences, like debarment from citizenship, which, in our generation, are more common. See, *e. g.*, Canada, Appendix, *infra*, p. A56. See Privy Council Order 8343, Sept. 16, 1942. And cf. Treaty of Friendship, Commerce and Reciprocal Establishments between Great Britain and Switzerland, 1855, Article V.

Finally, it is clear from the history of the treaty that this liability for contributions in lieu of military service was specifically mentioned in Article II, because taxation was the principal subject mat-

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lished in the other from paying the general war contributions which might be levied on the citizens of the country where they reside, without distinction between those who are exempted from personal military service and those who are held to it; they shall be subject thereto as well as to all other taxes required from citizens of the country themselves. This appears from the wording of the article, and such is the intention of the parties."

The Special Agent of the United States who negotiated the original Convention apparently concurred in this discussion, for he referred to the report of the Federal Council as follows (Dec. 26, 1850, quoted in 5 Miller, *op. cit.* 864): "This paper, as you will have perceived, gives a lengthened history of the negotiations and explains minutely the object of the various stipulations contracted between the two Republics."

ter of that Article and for that reason was given particular attention. See note 12, *supra*, pp. 36–37. Inclusion of a specific liability to make contribution in lieu of military service was evidently for the purpose, as the court below pointed out (R. 64), of preventing "discrimination against citizens and, we think, cannot be treated as an agreement that treaty nationals would be relieved from military service without affecting their status in other respects at all."

B. CONGRESS AND THE EXECUTIVE BRANCH HAVE CONSIDERED DEBARMENT FROM CITIZENSHIP TO BE CONSISTENT WITH THE RIGHT OF AN ALIEN TO BE FREE FROM MILITARY SERVICE

1. *The period between 1862 and 1898.*—During this period, which began only seven years after the proclamation of the Treaty here involved, the question of immunity from service was complicated by provisions in the laws of some of the states of the United States according various rights, including suffrage, to declarant aliens prior to full naturalization. And so, when the Act of July 17, 1862, c. 201, 12 Stat. 597, authorized the President to adopt regulations necessary to execute the draft of the militia,[13] while providing that "the enrolment of the militia shall in

[13] The Act of July 17, 1862, c. 201 (12 Stat. 597), amended the Act of Feb. 28, 1795, c. 36, 1 Stat. 424, to include the following:

"* * * If by reason of defects in existing laws, or in the execution of them, in the several States, or any of them, it shall be found necessary to provide for enrolling the militia and otherwise putting this act into execution, the President is authorized in such cases to make all necessary rules and regulations; and the enrolment of the militia shall in all cases include all able-bodied male citizens * * *."

all cases include all able-bodied male citizens", the War Department ruled that declarant aliens who had voted should be liable to the draft. And the Secretary of State published a letter stating that representatives of other powers would not complain in such cases.[14] On September 5, 1862, Secretary of State Seward wrote (4 Moore, *Digest of International Law* 53–54):

> There is no principle more distinctly and clearly settled in the law of nations, than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly claimed and insisted upon it in our intercourse with foreign nations. While the State of Indiana holds that an alien becomes a citizen by one year's residence and declaration of intention to become a citizen of the United States, the law of Great Britain holds that a native British subject owes allegiance to the British Government, until he has completely effected his naturalization in the United States, under the laws of Congress.
>
> In the very beginning of the war, the question arose between the two Governments in this way. A British subject residing in Maryland, who had filed a declaration of intention, but had not per-

[14] The foregoing is taken from the summary by Senator Doolittle, Feb. 16, 1863 (62 Cong. Globe 991). And note the reference to an incident in Pennsylvania where marshals watched the voting upon "the pretended fear" that aliens who had not been naturalized might vote without having been enrolled for the draft. 62 Cong. Globe 1217.

> fected his naturalization under the laws of Congress, claimed protection and redress from this Government on the ground that he had a British passport. * * * It is proper to state, however, that in every case where an alien has exercised suffrage in the United States, he is regarded as having forfeited his allegiance to his native sovereign, and he is in consequence of that act like any citizen liable to perform military service. It is understood, moreover, that foreign governments acquiesce in this construction of the law. It is hoped that under this construction your militia force will not be sensibly reduced.

This view was to play an important part in the subsequent conscription legislation. When this legislation was first considered in the Committee of the Whole (Feb. 16, 1863; 62 Cong. Globe 976–997), the Senate rejected an amendment to subject declarant citizens who had voted to compulsory service. 62 Cong. Globe 991. The amendment was opposed on the ground that declarants were still subjects of foreign powers. Practical considerations as to possible involvements with other powers were also raised. Supporters of the amendment asserted, however, that foreign powers seemed unwilling to intervene against drafting of declarants who had voted; that a declaration of intention and exercise of suffrage constituted a waiver, at the least, of the alien's rights to object, and that if a foreign government chose to object, a discharge could be

granted, as had even been done in certain cases of volunteers. 62 Cong. Globe 991–993.

It was in this discussion that an early suggestion of debarment from citizenship as a consequence of military exemption appears. Senator Doolittle stated that a declarant appearing before a naturalization court, who had voted in elections and resided in the United States for five years but who had pleaded exemption as an alien, "is not proving that he is a good citizen and attached to the Constitution." 62 Cong. Globe 993.[15]

When the bill was reported out to the Senate (62 Cong. Globe 997–1002), the amendment providing for the drafting of declarant aliens was again offered and was not restricted to those who had voted.[16] Substantially the same contentions

[15] The contention is not here cited as a correct statement of the law in the absence of a specific enactment, but as an early illustration of the thinking which later developed into a legislative debarment of those who availed themselves of their right to exemption from military service; a criterion of citizenship seems contemplated in this discussion rather than a compulsion to serve.

[16] The restriction of the provision to only those declarants who had voted was omitted because "it makes an exception in favor of those who have not exercised the privilege of voting." 62 Cong. Globe 1001. By the Proclamation of May 8, 1863 (see *infra*, p. 43) liability for military service was retained as to voting declarants even if they were no longer found within the United States.

The eventual specific language of the Act of March 3, 1863, on this point was as follows (12 Stat. 731): "That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens * * * are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose. * * *"

were voiced and the drafting of declarant aliens was again urged (this time by Senator Cowan) as "the very best mode of testing them during the three years of probation * * *." The drafting of all declarant aliens was, upon final vote, provided in the Senate bill. 62 Cong. Globe 1001.

When the Senate bill came before the House of Representatives, an amendment was offered at the outset of the deliberations (February 23, 1863, 62 Cong. Globe 1214) providing that only "citizens" should be enrolled. Objection was voiced to the lawfulness of drafting aliens, and was countered with the suggestion that no aliens would thereby be required to "fight against their own sovereigns." 62 Cong. Globe 1223. Two days later, a substitute bill was offered, likewise limited to "citizens." The substitute was defeated without specific attention to any particular aspect, including the question concerning aliens. 62 Cong. Globe 1292–1293. We do not find further discussion concerning the liability of aliens in the extensive debates in the House, but when the bill, amended in other respects, was returned to the Senate, two Senators protested, in the very last comments before passage of the bill, that a declarant does not yet owe allegiance, that he may perhaps never become a citizen, that he might be conscripted to serve against his own country, and that difficulties with other countries might result. Without further answer to these protests,

the bill was passed (62 Cong. Globe 1390–1391) and became law on March 3, 1863 (12 Stat. 731).

On May 8, 1863, the President issued a proclamation (13 Stat. 732) stating that declarant aliens who had not voted or exercised any other political franchise had claimed the right "under treaties or the law of nations" to renounce their purpose to become citizens. The proclamation provided that no plea of alienage would be allowed in the case of any declarant alien who should be found within the United States after 65 days from the date of the proclamation or in the case of any declarant alien who had voted or exercised any other political franchise.[17]

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[17] The text of the portions of the proclamation containing the statement concerning the aliens and the rule applied to them, was as follows:

"*Whereas*, It is claimed by and in behalf of persons of foreign birth within the ages specified in said act who have heretofore declared on oath their intentions to become citizens under and in pursuance of the laws of the United States, and who have not exercised the right of suffrage or any other political franchise under the laws of the United States, or of any of the states thereof, that they are not absolutely concluded by their aforesaid declaration of intention from renouncing their purpose to become citizens, and that, on the contrary, such persons under treaties or the law of nations retain a right to renounce that purpose and to forego the privileges of citizenship and residence within the United States under the obligations imposed by the aforesaid act of congress:

"Now, therefore, to avoid all misapprehensions concerning the liability of persons concerned to perform the service required by such enactment, and to give it full effect, I do

It is to be observed that this legislation and proclamation sought to compel declarant aliens to render military service if they had voted, even though they might leave the country in 65 days, and it possibly contravened the treaty with Switzerland in prohibiting residence in the United States by declarant aliens except upon the condition of military service. The provisions concerning residence were specifically set forth in the treaty, as distinguished from the complete silence concerning any right to naturalization. But no objection on behalf of Swiss aliens appears in Moore's Digest for this period, and while some protests were made with respect to British and French declarant aliens who had voted, these protests were not pressed by their respective governments. 4 Moore, *op. cit.* 54–56. It may be, however, that some protests of this kind were honored, in light of the later statement of Secretary

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hereby order and proclaim that no plea of alienage will be received or allowed to exempt from the obligations imposed by the aforesaid act of congress, any person of foreign birth who shall have declared on oath his intention to become a citizen of the United States under the laws thereof, and who shall be found within the United States at any time during the continuance of the present insurrection and rebellion, at or after the expiration of the period of sixty-five days from the date of this Proclamation, nor shall any such plea of alienage be allowed in favor of any such person who has so, as aforesaid, declared his intention to become a citizen of the United States, and shall have exercised at any time the right of suffrage, or any other political franchise, within the United States, under the laws thereof, or under the laws of any of the several states." 13 Stat. 732.

of State Bayard that, "there is not a single instance in which an alien was held to military duty when his Government called for his release." 4 Moore, *op. cit.* 55.[18]

This period, in summary, reveals a very early form of the concept of disqualification from citizenship of aliens who availed themselves of their exemption from military service. That principle was not in fact applied, because of the then requirement that declarant aliens must serve. But there was enunciated a criterion of naturalization, clearly distinguishable from any attempt to reduce or circumvent the exemption itself.

2. *The period from 1898 to the Selective Draft Act of May, 1917.*—In the draft laws of April 22, 1898, and May 18, 1917 (30 Stat. 361; 40 Stat. 76, 78), declarant aliens were again made liable to the draft, in language substantially identical with that of the legislation of March 3, 1863,[19] and without the avenue of escape provided by the proclama-

[18] In accord with this record as to releases, see statement of Secretary of State Blaine in 1880, 4 Moore, *op. cit.* 60–61. *Contra*, as to a few cases in which British aliens had voted, see statement of Assistant Secretary of State Davis in 1873, 4 Moore, *op. cit.* 58.

[19] In the 1917 legislation, the words "male persons not alien enemies" were employed instead of "persons of foreign birth."

tion of May 8, 1863. It was afterward admitted that the 1917 enactment violated the rights of aliens, and that neither the State Department, the War Department, nor the Committee on Foreign Affairs had directed attention to the fact of such violation when the bill was being enacted. 56 Cong. Rec. 4855 (Congressman Dent, April 9, 1918); Hearings of House Committee on Military Affairs on S. J. Res. No. 84, 65th Cong., 1st sess., pp. 4, 10 (Secretary of State Lansing, September 26, 1917).

A case occurring in 1914, between the date of these two enactments, is recorded in 3 Hackworth, *Digest of International Law* 608, disclosing that Secretary of State Lansing took the position that Puerto Ricans of American nationality should not be inducted into military service in the Dominican Republic.

On October 6, 1917, the United States District Court for the Southern District of California denied exemption from the draft to a declarant Spanish alien, despite the treaty with Spain (33 Stat. 2108) exempting aliens from military service. The court spoke of a "positive repugnancy" between the draft act and the treaty and decided that the draft act, being later in time, would be controlling. *Ex parte Larrucea,* 249 Fed. 981, 985. Moreover, vigorous protests were made by foreign diplomatic representatives, including not only the Swiss Minister but also representatives of countries with which no such specific treaty

provisions prevailed. 3 Hackworth, *op. cit.* 603, 608–610.

A procedure was developed in December 1917, by the War Department and Department of State for the release or exemption of declarant aliens at the request of diplomatic agents. This procedure was, however, termed inconvenient and unsatisfactory by the Swiss Minister, and by the Secretary of State in a letter to the House Committee on Military Affairs (February 14, 1918). 3 Hackworth, *Digest of International Law,* 603–605, 611. The Secretary of State's letter, summarizing the situation, referred to the diplomatic protests and continued (House Rep. No. 342, 65th Cong., 2d sess., pp. 2–3; 56 Cong. Rec. 4857–4858):

> * * * In some cases such requests were based upon our treaty stipulations to exempt the aliens in question from military service, which obligation seemingly must be regarded as having been violated by the selective service act. In other cases requests, little less insistent, were based on the asserted practice of nations to exempt from military service in international conflicts resident nationals of foreign countries. In still other cases, requests were founded upon treaty provisions which expressly reserve the alien nationality of persons who may declare their purpose to become citizens of the United States, but who have not completed the act of naturalization. On account of the number and insistence of such requests, and considering

the grounds upon which they were based, but without prejudice to any claims which the United States might have to the services of persons within its jurisdiction who have endeavored to absolve their former allegiance and indicated their intention to take up permanent residence in this country, the President has found it expedient in the conduct of foreign relations to indicate his willingness to discharge neutral aliens in certain circumstances, after they have been brought within his jurisdiction as Commander in Chief of the Army, by induction into the military service. Such inductions, however, which is a necessary prerequisite to discharge by the President, constitutes, in reality, a violation of the treaty obligations and asserted international practice upon which the protests of foreign diplomatic officers have been based. * * *

3. *The amendment of the 1917 Act to exempt declarant aliens upon application, and to debar from citizenship upon such application.*—The amendment suggested by the War Department and Department of State on February 14, 1918, would have exempted neutral aliens without distinction between treaty aliens and nontreaty aliens or between declarants and nondeclarants. It attached no consequences to the exemption, such as debarring from citizenship. H. Rep. No. 342, 65th Cong., 2d sess., p. 3. On April 9, in the debate on the proposed amend-

ment, a letter of President Wilson was read, stating, *inter alia,* "Whatever the general merits of the question, if we could consider ourselves absolutely free with regard to it, we are unfortunately not free but are bound by definite treaty obligations * * *" (56 Cong. Rec. 4854).

In the interval before passage of any amendment, the President announced a new procedure (April 11, 1918) under which declarants and non-declarants of treaty countries would be discharged upon request of diplomatic representatives, but only non-declarants of non-treaty countries would be discharged, and then only upon the request of the Secretary of State and in cases where a full and fair hearing had not been given by the local draft board. 3 Hackworth, *op. cit.,* 606–607.

On June 25, 1918, Senator Hitchcock introduced an amendment applying the draft to resident declarant neutral aliens who "failed to assert any claim to immunity as foreign nationals," with a proviso that "If such claim to *a*mmunity [sic] is asserted it shall be recognized and shall operate automatically as a withdrawal and cancellation of the declaration to become an American citizen, and the individual shall be forever debarred from becoming one." Senator Hitchcock supported the amendment by contending that in drafting neutrals "we are violating treaties, and to some extent are violating international comity"; that the War Department construed the then Act of Congress as "repealing

the treaties" although the State Department was "unable to take that view of it * * *"; that the debarring from future naturalization "will restrain men from setting up the claim" and was included to prevent "a good deal of ill feeling and a good deal of indignation on the part of American citizens whose sons are subjected to the draft to have their neighbors released and to stay at home to do the voting while their sons go to the war." 56 Cong. Rec. 8249.

On June 28, an amendment was offered as a committee amendment, making declarant aliens other than enemy aliens liable to the draft "except citizens or subjects of countries neutral in the present war * * *." But Senator Hitchcock, also a member of the Committee, offered an amendment in the form of a proviso which exempted only upon the withdrawal of the declaration. The debarring provision had not been included in either form. The Senator reported that the State Department preferred the committee amendment but was not opposed to the form providing for withdrawal of the declaration.

In the course of the debate, a number of senators insisted that the mere withdrawal of the declaration would not be sufficient—that the withdrawing alien should be debarred from citizenship. While there were references to the possible effect of inducing military service by aliens, the principal emphasis was on the undesirability

of exempt aliens as voters, and on the theory that naturalization qualifications had not been, and could not be, prescribed in any treaty.

The debate in the Senate on this question is so germane to the issue involved in this case that extensive quotation therefrom seems warranted (56 Cong. Rec. 8415–8419):

> Mr. HITCHCOCK. * * *
>
> The present law is that the draft includes declarants—that is, men who declare their intention to become citizens of the United States and have taken out their first papers. As far as our cobelligerents are concerned, that makes no difference; but when it comes to neutral countries, it interferes with treaty obligations, and it also interferes with the rule of international comity.
>
> The State Department, therefore, desires that the War Department shall relieve declarants from enforced military service. Heretofore the War Department has refused to do it because it has construed the act of Congress as superseding a treaty, even superseding international comity. The State Department proposes—or at least this committee amendment proposes—absolutely to exclude declarants of neutral countries, and if that is carried out we shall lose tens of thousands of soldiers.
>
> I propose in my proviso to leave the law as it is now and provide that when the declarant of a neutral country, through him-

self or through his ambassador or minister, asserts his immunity, he shall be relieved, but his act in appealing to his country shall serve to withdraw his application for American citizenship. I think that ought to be done.

* * * * *

Mr. McCumber. I wish to know why the Senator has pulled the teeth out of his amendment. A great many of us favor this very strongly as it was introduced, believing that under the comity of nations we had no right to insist that one who had merely declared his intention and had not become a citizen should join our Military Establishment, but we were in hearty accord with the view that, after having declared his intention to become a citizen, if he then refused to perform the duties of a citizen and become a soldier he should forever be debarred from the right to become a citizen. I am sorry to have the Senator leave that out of his amendment.

Mr. Hitchcock. It was because I learned through the State Department that we have a number of treaties with countries with which that might seem to be in conflict. I do not agree with the State Department on that interpretation, but after all it is not a matter of great importance to brand a man as incapable of ever becoming an American citizen. The important thing is this: When the declarant is excused from service in the Army through the interposition of the ambassador or min-

ister of his country he is, in many States of the Union, still able to vote at the American elections. I want to deprive him of that right, so that when his American neighbor is drafted and goes to the war he can not use his immunity as a foreign citizen and still exercise the right of suffrage in this country.

* * * * *

Mr. HITCHCOCK. * * * The result of it will be, in my opinion, that thousands of declarants who now appeal to neutral diplomatic representatives will go and serve the country they have already sworn to become citizens of; that they will not appeal to their ambassadors and their ministers in those neutral countries, and we think the Army will receive their service. If they do not, they certainly will not be allowed to remain in this country and vote when their American neighbors, native and naturalized, have been forced to go to the war.

* * * * *

Mr. CHAMBERLAIN. * * *

Now, Mr President, under decisions of the courts and under the rules of international law, the declarants for citizenship, those who have taken out their first papers, are still the nationals of their native country; they are not citizens of the United States. The proposal of the Senator from Nebraska [Mr. Hitchcock] is to meet a condition which exists in his State and

which probably exists in some other States of the Union, where, in violation of what seems to me to be good sense and good conscience, laws have been enacted allowing the nationals of other countries to vote. * * *

* * * * *

Mr. WILLIAMS. Then, if we want to make this amendment right, let it apply only to those who have declared their intention to become citizens in States where they cannot become voters.

* * * * *

Mr. LODGE. Mr. President, I shall not argue the venerable Martin Koszta case, with which everybody is familiar. I merely wish to suggest that the amendment as it now stands seems to me futile. I think we have got to add to it a prohibition against the alien receiving further first papers until at least the end of the war. That will give it effect.

Mr. HITCHCOCK. Mr. President, I have already indicated to the Senator from Wisconsin [Mr. LENROOT] that I shall be glad to perfect my amendment by accepting such a change.

Mr. LODGE. I should be glad to see citizenship refused altogether.

* * * * *

Mr. HITCHCOCK. Mr. President, I am endeavoring to get this amendment in such shape that it will be adopted; and while my judgment concurs with that of the Sen-

ator from North Dakota, I am confronted with the serious objection of the State Department. As it is now, the State Department has no objection to it.

Mr. LODGE. Mr. President, in that connection I should like to ask the Senator in what treaty ever made by us was there an agreement as to whom we should admit to citizenship or whom the other nation should admit to citizenship?

* * * * * * *

* * * As to naturalization, do I understand that the State Department says that in any treaty we agree to admit certain people to naturalization?

Mr. CHAMBERLAIN. Oh, no. The contention of the State Department, let me say to the Senator, is that it is a question of drafting into the service.

Mr. LODGE. * * * I am anxious to know what treaty there is in which we guarantee to admit anybody to citizenship or to first papers or anything else?

Mr. HITCHCOCK. Mr. President, I perhaps went too far when I said "the State Depa..ment." I should have said "an official of the State Department," * * *.

* * * * * * *

* * * Only one official of the State Department has called my attention to these treaties, and thought that while it is all right to withdraw their declaration of intention it might be questionable whether we should say that they are forever prevented

from becoming citizens of the United States. * * * That will result in keeping many more men in our Army, it will result in relieving the ministers from a great many appeals, and it will relieve the State Department from a great deal of work.

Mr. LODGE. I did not know that there were any treaties that interfered with our right of saying who should be citizens of the United States, and I should like to inquire into it. But, Mr. President, the thing we want to meet at this time is to prevent these men who have claimed exemption because they are subjects or citizens of another power, after they have taken out their first papers, from going around the corner and taking out another set of papers, and, in many States, exercising all of the rights of citizens, all the privileges of electing men to office, and everything of that kind, while they send the native-born Americans or the naturalized Americans across the water.

* * * * *

Mr. FALL. * * * I do not agree at all with the legal conclusions of this official of the State Department. We have naturalization treaties with certain countries, it is true. They are referred to here, if the Senate desires to hear them; but there is nothing in any one of those treaties which prevents our classifying or in any way providing the conditions upon which we will admit citizens. That is the pre-

rogative of this great Government of the United States.

Mr. LODGE. It is the prerogative of every sovereign state.

Mr. FALL. We can pass a law repealing in a moment all of our naturalization laws, despite our treaties, and we do not violate a treaty with a single country with which we have a treaty. We can repeal them absolutely. Why, sir, that is a prerogative of the Government.

Mr. LODGE. And, if the Senator will allow me, we have recently entirely revised and changed our naturalization laws and imposed new conditions.

Mr. FALL. Why, certainly; but, Mr. President, to say that even under any treaty of any kind or character the United States Government cannot at any time pass just such legislation as was indicated in the first amendment of the Senator without violating a treaty is ridiculous. We can create a class of those citizens of neutral countries who refuse their military duty here, and say that they shall never become citizens, if we so desire.

Mr. LODGE. Of course we can.

Mr. FALL. It is a classification which is permissible, as the Supreme Court has decided in the Terry case, and time and time again.

On June 29, 1918, Senator Lodge offered an amendment making liable, *inter alia*, "male persons not alien enemies, or aliens not enemies who

are covered by treaties or conventions as provided in Chapter —— of this act[20] who have declared their intention to become citizens * * *," and adding the proviso that a neutral declarant alien "shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and shall forever be debarred from becoming a citizen of the United States." 56 Cong. Rec. 8485.

This proviso was adopted in the Act finally enacted on July 9, 1918 (40 Stat. 845, 885). Of the utmost significance here, since this provision was substantially the same as that adopted in the 1941 enactment here in question (55 Stat. 844), is the statement of Senator Lodge, in response to a question whether it would violate the much broader treaties with reference to admission of aliens: "It does not interfere and cannot interfere with any treaty we have ever made. No country would submit for one moment to an agreement with another affecting the conditions on

[20] The provision with reference to treaties apparently contemplated treates with co-belligerents which had been under earlier discussion. The language concerning treaties was eliminated in the later conference report (Sen. Doc. No. 260, 65th Cong., 2d sess.; H. Rep. No. 746, 65th Cong., 2d sess.; 56 Cong. Rec. 8806).

which a foreigner could become a citizen." 56 Cong. Rec. 8485.

4. *The developments from the 1918 amendment of the 1917 Act to the original form of the 1940 Act.*—Further light on the administrative position concerning aliens was afforded by a letter of Acting Secretary of State Polk to the Attorney General on August 9, 1918, stating, *inter alia* (3 Hackworth, *Digest of International Law*, 599):

> It may be argued that the number of treaties providing for the exemption of citizens or subjects of the contracting parties from military service abroad is evidence of a practice among nations to draft aliens into their forces. I cannot, however, concur in this argument, as it seems to me that these treaties may as well be regarded as evidence that nations might, in the exigency of war, be inclined to break the law and practice of nations under which aliens are exempted from compulsory military service abroad in an international war. A review of the diplomatic history of the United States in respect to compulsory military service found in the enclosed documents discloses that, so far as the history of the United States is concerned, most countries whose subjects or citizens have been affected by military service in the United States have strongly protested against such service, as has the United States when the case was reversed. * * * It should be borne in

> mind, however, that the legislation of the United States while, of course, binding upon persons within its territory, and the announcements of Secretaries of State of the United States are not sufficient upon which to base a conclusion as to the rule of international law on this subject. For that reason I have enclosed a summary of the legislation of other countries * * *. From this convenient summary it will be observed that it is not the practice of nations to compel aliens to serve in their armies.

The Inter-American convention concerning the status of aliens, signed at Havana on February 20, 1928, prohibited compelling of "military service" by "foreigners"; it permitted "domiciled" foreigners to be compelled to perform police, fire-protection, "or militia duty for the protection of the peace of their domicile against natural catastrophes or dangers *not resulting from war.*" [Italics supplied.] 46 Stat. 2754.

On February 11, 1931, the proviso enacted in 1918 for debarring from citizenship declarant aliens who claimed military exemption was modified so that it no longer applied to withdrawals of declarations of intention and discharges after November 11, 1918. 46 Stat. 1087.

On December 10, 1932, in response to reports that the Peruvian government had attempted to compel American pilots to serve in connection with military operations, the Department of State

instructed the Ambassador in Lima that the United States could not admit the right of any foreign government to impress American aviators into military service regardless of any provisions found in contracts between Peru and the employers of the aviators. 3 Hackworth, *Digest of International Law*, 607–608.

5. *The original form of the Selective Training and Service Act of 1940, which provided no exemption for neutral aliens.*—At the Senate hearings on the first draft of the bill which became the 1940 Act,[21] the War Department suggested an amendment exempting a declarant alien "upon his making declaration withdrawing his intention to become a citizen of the United States, which withdrawal shall operate and be held to cancel his declaration * * * and he shall forever be debarred from becoming a citizen of the United States * * *."[22] The suggested amendment was not made in the printed bill of September 14, 1940. The Senate committee report (No. 2002, 76th Cong., 3d sess.) stated that "alien, nondeclarant representatives of foreign governments by reason of international law are not subject to control in this character of program" (p. 8), but made no reference to other aliens. The bill, as enacted on September 16, 1940 (54 Stat. 884),

[21] Hearings before the Senate Committee on Military Affairs on S. 4164, July 3, 5, 10–12, 1940, p. 357.

[22] There was excepted from this provision any subject of a country with which a treaty required reciprocal service of resident declarant aliens.

drafted declarant neutral aliens and contained no proviso for their exemption.

6. *Developments to and including the 1941 amendment, which provided exemption and debarment.*—On April 15, 1941, the Secretary of State recommended legislation to allow declarant aliens to obtain exemption upon making a declaration withdrawing their declaration of intention to become a citizen, the alien thus to be debarred from becoming a citizen. In letters dated April 15 and May 23, 1941, the Secretary stated, *inter alia* (Sen. Rep. No. 394, 77th Cong., 1st sess., pp. 3–4):

> * * * Some of these complaints are based on treaty provisions and the Mexican Embassy has taken the position that the drafting of its nationals for military service is contrary to the principles of international law. The Department is desirous of honoring the treaty obligations of this Government and after conferences with the other interested agencies of the Government it has concluded that the appropriate way to solve the problem is by the amendment of the Selective Training and Service Act. * * *
>
> * * * * * *
>
> It is observed that the treaty provisions on which foreign governments have based their complaints are reciprocal in their nature and that this Government has the right to claim the exemption of its nationals from military service under similar circumstances. Indeed on numerous oc-

> casions in the past it has objected to the compulsory military service of its nationals in the armed forces of foreign states even in the absence of treaty provisions guaranteeing such exemption.

The Senate Committee on Foreign Affairs reported favorably. Both the report (No. 394, *supra*) and the above letter of May 23, 1941, adverted to the fact that the proviso added by the 1918 amendment had also debarred the exempted aliens from citizenship. The report stated, further, that the draft of legislation had been agreed upon by representatives of the Selective Service System, the Department of Justice, and the Department of State and approved by the President, and that the Department of State doubted that many aliens would avail themselves of the exemption "particularly if as recommended they are forever debarred from becoming citizens of the United States, and that disability will carry with it others under our laws, such, for example, as inability to own real property in certain states." 87 Cong. Rec. 5726.[23]

[23] In connection with the State Department's approval of the debarment provision in 1941, there should be noted the 1919 opposition "in the State Department", referred to by State's Solicitor Woolsey. See Pet. Br. 13. This nonofficial opposition was premised not on the belief that a debarment provision might conflict with military exemption treaties but because "We thought that it was an illustration of a wrong principle in public policy to have a class of aliens in this country who never could become citizens." *Ibid.* As to the State Department's position in World War I, see also Appendix, *infra*, p. A84.

The legislation in the form recommended was passed by the Senate on June 30, 1941, but not by the House.[24]

The amendment for exemption of neutral aliens in the form finally adopted and here applied to petitioner, was presented in December 1941, as a part of the bill for extension of liability for military service. It provided for service by non-declarant aliens as well as declarant aliens; it made no distinction between treaty and non-treaty aliens; and it provided for exemption of aliens and debarring from citizenship upon application for exemption.

Since this bill was quickly introduced and passed in the wake of the Pearl Harbor attack in December 1941, its legislative history is barren. All that appears is that at the hearings of December 15 and 16, 1941 (Hearings, Senate Committee on

[24] The bill as passed by the Senate was to amend the 1940 Act by adding at the end of Section 3 (a) the following:

"*Provided further*, That any male alien residing in the United States who has declared his intention to become a citizen of the United States who is registered or who is or may become liable to registration under the provisions of this act shall be relieved from liability to training and service thereunder *if he makes a declaration* prior to becoming a member of the land or naval forces or within a time fixed by the President if he is already a member of the land or naval forces, in accordance with such regulations as the President may prescribe, *withdrawing his intention to become a citizen* of the United States which shall be held to cancel his declaration of intention to become a citizen of the United States and to forever bar him from becoming such a citizen." [Italics supplied.]

Military Affairs on S. 2126, 77th Cong., 1st Sess., Vol. 1, p. 46), the legislative officer of the Selective Service System testified that the bill had been considered by the War Department, and the provisions under consideration had been informally approved in substance by Mr. Raymond T. Yingling, Assistant Legal Adviser in the Department of State.[25]

The Act here involved was passed on December 20, 1941 (55 Stat. 845, 50 U. S. C. App. 303). Requests for exemption of neutral aliens were made, for the most part, in the cases of Swiss, Spanish and Costa Rican subjects, since great numbers of other aliens were either co-belligerent or enemy aliens. Appendix, *infra*, pp. A14, A60–A62, A67–A69, A70–A71, A72–A73, A78–A87. The practice adopted as to neutral aliens (particularly with reference to Switzerland and the specific case of petitioner) is set forth in the Statement, *supra*, pp. 12–19. It may be summarized as follows. Diplomatic representatives sent letters to the Department of State asking the exemption for their nationals (on an "uncondi-

[25] In his testimony, Selective Service's legislative officer also stated that the phrase concerning debarment from citizenship had been inadvertently left out of the Attorney General's copy of the bill. The Attorney General desired to make no commitment on that particular provision because there was still pending in the House the earlier proposed amendment passed by the Sen[illegible] on June 30, 1941 (discussed *supra*, pp. 62–64) and the matt[illegible], accordingly, was one solely for the determination of Congress.

tional" basis, on the part of the Swiss, by reason of the 1850 treaty). The Selective Service System, upon the basis of the language of the act, insisted on the filing of an application for exemption. The form of the application was revised to exclude language that might add an express waiver by the applicant to the debarment provision contained in the act, but the debarment provision was recited as a *caveat* in the form, below the signature. The Swiss Legation was informed that its contention that an unconditional exemption was available would have to be decided by the courts. See Appendix, *infra*, pp. A20, A23.

Certain matters subsequent to the legislation and events here in question, may also be noted. By the Act of October 29, 1945 (59 Stat. 551, Section 28 (c) of the Immigration Act of 1944 was amended to delete from the provisions of that section certain enumerated statutes repealed or superseded by more recent legislation, and to include within the definition of the term "ineligible to citizenship" the citizens of neutral countries who, by having filed applications for exemption from military service, under Section 3 (a) of the 1940 Act, as amended, had rendered themselves ineligible to citizenship. It was the interpretation of the Department of State, in a memorandum to the Swiss Legation, on November 28, 1945, that no contravention of the Treaty of

1850 was thereby involved, the Department stating, *inter alia* (Appendix, *infra*, pp. A74, A76):

> It is to be noted that none of the legislation mentioned above in any manner deprives Swiss citizens of the privileges or exemptions enjoyed under the Treaty of Friendship and Commerce concluded between the United States and Switzerland in 1850, including that provision of the Treaty to the effect that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service." While Swiss citizens are exempt from military service, there is no provision in the Treaty relating to the qualifications of nationals of one of the countries to become citizens of the other. Naturalization questions are outside the purpose and purview of the Treaty.

The position of the executive branch of the Government, as of August 16, 1946, may also be noted in the following memorandum from the President's Military Aide to the Acting Secretary of State (Appendix, *infra*, p. A77):

> There has been considerable correspondence regarding the matter of citizens of countries with whom we have bilateral treaties relative to their liability for military service. The President has not had time to go into the various fine details of the argument, but his position is as follows:
>
> He is of the opinion that now that direct participation in war has ceased, the aliens

> of the four or five countries with which we have bilateral treaties residing in the United States should be excused from Selective Service. He feels that this would make for good feeling and that the number of men that would be lost to military service would be infinitesimal. He also, however, is of the strong opinion that anyone excused from military service by virtue of these agreements, both during the war and after, should be forever excluded from attaining citizenship.

In the respective bills leading to the Selective Service Act of 1948, the Senate Bill provided exemption for aliens, but persons exercising the exemption were to be debarred from citizenship. The House amendment excluded nondeclarant aliens from liability for service. The conference agreement of June 19, 1948, adopted the provisions of the Senate bill "but insuring that properly deferrable aliens may be relieved from liability for induction without debarment from citizenship." (H. Rep. 2438, 80th Cong., 2d sess., p. 45.) Section 6 (a) was apparently considered capable of effecting the last mentioned purpose by relieving from liability "persons in other categories to be specified by the President, residing in the United States, and who have not declared their intention to become citizens of the United States." 50 U. S. C. App., Supp. III, 456 (a). This provision had been included, in nearly identical language, in Section 5 (a) of the 1940 Act, by the amendment of December 20, 1941

(55 Stat. 844, 845), but we find no record of its use.[26] Under the later, 1948 Act, all nondeclarant treaty aliens were by a general regulation on August 30, 1948, deferred to class IV–C, if such deferment was requested by their government and approved by the Department of State (13 F. R. 5033; 32 C. F. R. 622.18 (b)).[27]

7. *Summary and conclusions.*—It appears from the foregoing that though sometimes honored only in the breach, particularly by the Congress in the heat of the early stages of war, a treaty right,

[26] By approving a State Department memorandum, the President, on September 24, 1944, appears to have granted some exemption to treaty aliens, though apparently only to co-belligerent Costa Ricans who could, as co-belligerents, not otherwise secure exemption. Appendix, *infra*, p. A88. But, whatever its scope, that exemption could not aid petitioner since it was granted after Moser claimed and was granted exemption, and, secondly, the exemption, under Section 5 (a) of the Selective Training and Service Act of 1940, see *supra*, pp. 3–4, could apply only to nondeclarants, and Moser was, in fact, a declarant. See *supra*, pp. 25–26. The Presidential exemption referred to was not incorporated into the Selective Service regulations and its effectiveness is consequently problematical.

[27] Petitioner suggests (Br. 17) that the 1948 regulation referred to in the text simply made explicit the procedure followed under the 1941 amendment of the Act of 1940. See also Br. 22, 32. That is not true. Both the 1940 Act (section 5 (a) and the 1948 Act (section 6 (a)) left the President free only as to nondeclarants and, as has been noted, *supra*, note 26, petitioner, being a declarant, could not have been comprehended in any executive exemption. The procedure applicable in petitioner's case was not the automatic exemption granted in 1948; to secure exemption under the 1940 Act, as amended, a personal application for exemption was required. Hence there is no parallel between the 1948 procedure and that applicable in this case.

and sometimes, a less specific right under international law, of aliens to be free from general military service, has been recognized. But at no time have the officials of our Government recognized a concomitant right to American citizenship in neutral aliens who refuse military service.

From the days of the Civil War, freedom from military service and a right to citizenship have been deemed related only to the extent that it has been felt that a refusal of service by an alien was ground for disqualifying him as an applicant for citizenship. It has never been thought here that recognition of a right to freedom from military service precluded debarment from citizenship as a consequence of a claim to such right. This is partly because the bar to naturalization has been conceived of not as a penalty attaching to a refusal to serve. Instead the thought has been, as Senator Doolittle first put it, *supra,* p. 41, that an alien pleading exemption "is not proving that he is a good citizen and attached to the Constitution." Compare *In re Trachsel,* 271 Fed. 779 (S. D. Ohio) (Swiss alien); *Petition of Escher,* 279 Fed. 792, 793 (S. D. Tex.) (same). See also Hazard, *"Attachment to the Principles of the Constitution" as Judicially Construed in the United States* (1929) 23 A. J. I. L. 783, 785, 791–802.

While under the Selective Service Act of 1948, *supra,* pp. 68–69, the President, exercising a discretion conferred on him by Congress, has relieved nondeclarant treaty aliens from service without imposing a naturalization debarment, there is no evi-

dence whatever that that has been done under a sense of compulsion imposed by treaty obligation.

II

THE DEBARMENT PROVISION OF SECTION 3 (a) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, APPLIES TO "TREATY ALIENS"

If, as we have sought to show in Point I of the Argument, *supra,* pp. 30–70, the treaty of 1850 between the United States and Switzerland had nothing to do with naturalization and did not preclude debarment from citizenship as a consequence of a claim to freedom from military service, there would seem to remain no real question that the treaty and the debarment from citizenship provision in Section 3 (a) of the Selective Training and Service Act of 1940, as amended, see *supra,* p. 3, can stand together.[28]

[28] It is one thing to make debarment from the "political right" of citizenship not covered by the treaty of 1850 a consequence of a claim to military exemption, and quite another to deport an alien who makes such claim, as Congressman Lufkin proposed to do in 1919. See Pet. Br. 12–13. For the right of the nationals of one country to "establish themselves permanently" in the other is specifically granted by the same Article of the treaty of 1850 (Article I) which specifically excepts "political rights". See *supra*, pp. 32–33. Hence the opposition of the State Department to this proposal is not at all relevant to the question here involved.

Similarly, the federal district court decisions arising under the 1917 Act, cited by petitioner (Br. 13–14) are irrelevant. They stand only for the proposition that the unamended 1917 Act, see *supra*, pp. 45–48, compelling the military service of declarant aliens and giving them no opportunity to claim exemption, is inconsistent with a treaty granting freedom from military service. That proposition is undisputed here.

In other words, when in 1941, Congress provided, in Section 3 (a) of the Selective Training and Service Act, *supra,* p. 3,

> That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States * * *

it did not take from the petitioner anything granted him by the treaty of 1850. The benefits inuring to one claiming exemption under the treaty and to one claiming exemption under the Act are identical—relief from military service.[29] 2 Hyde, International Law (1922) p. 256.

The treaty of 1850 does not preclude voluntary enlistment of nationals of the respective signatory powers in the armed forces of the other (cf. 4 Moore, *Digest of International Law,* p. 66),

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[29] Petitioner seeks to support his claim of conflict between the treaty and the statute by referring (Br. 19) to "the amendment to the Immigration Act of 1924 (59 Stat. 551) which rendered inadmissible for permanent residence, neutral aliens who claimed draft exemption." There is no occasion in this case for deciding whether that provision and the treaty right to reside in this country may stand together, for the right to citizenship here involved is distinct from a mere right of residence. Compare *supra,* note 28, p. 71.

and there were many "treaty aliens" who refused to take advantage of these rights and elected to serve their adopted country. When, however, petitioner chose to exercise his "treaty option" to choose freedom from military service and thus to free himself from the liability to military service imposed on him by Section 3 (a) of the Selective Training and Service Act, he incurred "that bar" which "comes into existence when an alien resident liable for service asks to be relieved." *McGrath* v. *Kristensen*, 340 U. S. 162, 172.

Indeed, petitioner seems to concede as much, for he says that if the statute and the treaty are not inconsistent, "petitioner mistakenly attempted to perform an act which was impossible as a matter of law, i. e. to seek draft exemption under the treaty without incurring the disability of the Act." (Br. 24.) He seeks, however, to invoke an estoppel against the Government, urging that petitioner acted under mistake of law "known to, shared and induced by the Department of State and the Selective Service System," and concluding that "the statute should be liberally construed to avoid the imposition of the penalty." (Br. 25.)

Reserving for the moment the question of whether there is any basis for estoppel in the circumstances of this case (see Point III, *infra*, pp. 79–88), it should be noted, initially, that an estoppel, if any, would have no relevance to how the statute should be construed; estoppel is a

matter distinct and apart from the proper reading to be given the statute. In any event, construction of Section 3 (a) of the Selective Training and Service Act to make its debarment provision inapplicable to petitioner would be in the face of Congress' explicit purpose to debar aliens claiming exemption from service whether or not the claim is conceived of by the applicant as one made under the treaty, under international law, or solely under the Selective Training and Service Act.

A. CONGRESS INTENDED THE DEBARMENT PROVISION TO BE APPLICABLE TO ALIENS CLAIMING EXEMPTION UNDER A TREATY

As we have seen, the prototype of the statutory provision here involved appeared first in the 1918 amendment to the Selective Draft Act of 1917. 40 Stat. 845, 885. That amendment provided that a neutral declarant alien

> shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen, and he shall forever be debarred from becoming a citizen of the United States.

This provision was inserted, significantly, because, and not in spite of the fact that, as President Wilson put it, "we are bound by definite treaty obligations." 56 Cong. Rec. 4854. The amend-

ment was supported in the Senate because it was said that in drafting neutrals, "we are violating treaties, and to some extent are violating international comity." 56 Cong. Rec. 8249.

When it was decided that a claim to exemption should result in debarment from citizenship, there was no thought that this consequence could be avoided by treaty aliens. An explicit contrary purpose was, indeed, revealed. For, as stated on the floor of the Senate (56 Cong. Rec. 8418), "there is nothing in any one of those treaties which prevents our classifying or in any way providing the conditions upon which we will admit citizens." See *supra*, p. 56.

Similarly, in 1941, when proposals which eventuated in the statutory provision here in question were made (see *supra*, pp. 62–65), the Senate Committee on Military Affairs stated (S. Rep. No. 394, 77th Cong., 1st sess., p. 2):

> The State Department considers that this proposed legislation should be enacted in order that the Government may honor its treaty obligations; that as a practical matter it is doubted that many alien declarants will avail themselves of the right to claim exemption, particularly if as recommended they are forever debarred from becoming citizens of the United States * * *"

A statute thus designed to honor treaty obligations can hardly be read as inapplicable to persons like petitioner to whose benefit those obligations redounded.

But petitioner states that the Selective Training and Service Act renders ineligible to naturalization only "those relieved from liability under this Act," and argues that petitioner was relieved from liability under the treaty and not under the Act (Br. 22–23). Passing petitioner's free reading and quotation of the Act,[30] the short answers to his argument are found in Congress' specific purpose outlined above (*supra,* pp. 74–75), the fact that the Act did impose the liability to serve from which he was relieved,[31] and the fact that nothing in the Act makes the applicability of the debarment from citizenship proviso turn on whether the alien has not only a statutory, but also a treaty, right to be relieved from that liability. The phrase "under this Act," in Section

[30] Section 3 (a) does not contain the quoted phrase, "those relieved from liability under this Act." See *supra*, p. 3.

[31] Section 3 (a) of the Act provides that "every male citizen of the United States, and every other male person residing in the United States * * * shall be liable for training and service in the land or naval forces of the United States." See *supra*, p. 3.

Under Section 5 (a) of the Act, *supra*, pp. 3–4, only certain specified groups within which petitioner does not fall "and persons in other categories to be specified by the President, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States * * * shall be relieved from *liability* for training and service." [Italics supplied.] Since petitioner was not brought by the President within Section 5 (a), and probably could not have been since he was a declarant alien, he was liable for service under the Act. See *supra*, note 26, p. 69.

3 (a) applies only to the "training and service" and at no point refers to the source of the alien's exemption from service.

B. TO IMPLY AN EXCEPTION TO THE DEBARMENT PROVISION IN FAVOR OF THOSE HAVING A PRE-EXISTING RIGHT TO FREEDOM FROM SERVICE WOULD TEND TO MAKE THE DEBARMENT PROVISION NUGATORY

The right to be free from military service that is granted by the treaty here in question is, to a very large degree, merely declaratory of a right generally deemed to be granted by international law. Thus, as early as 1804, Secretary of State Madison set forth the international understandings, employing the following language in a message to the Minister to England (4 Moore, *Digest of International Law* 52):

> Citizens or subjects of one country residing in another, though bound by their temporary allegiance to many common duties, can never be rightfully forced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both, and the violation of this law by the avowed impressment of American citizens residing in Great Britain may be pressed with the greater force on the British Government, as it is in direct inconsistency with her impressment of her own subjects bound by much stronger ties to the United States, as above explained, as well as with the spirit of her commercial laws and policy,

> by which foreigners are invited to a residence. The liberation of the persons comprehended by this article, therefore, can not be justly or honorably refused, and the provision for their recompense and their return home is equally due to the service rendered by and the wrong done to them.

This understanding of the law of nations has often been reiterated by our Secretaries of State (*supra,* pp. 39, 46, 47–48) and the matter is perhaps most fully discussed by Acting Secretary of State Polk, in a letter of August 9, 1918, quoted *supra,* pp. 59–60.

Consequently, if Section 3 (a) of the Selective Service Act of 1940, as amended, were to be construed as inapplicable to "treaty aliens", it would become exceedingly difficult to draw that line without excepting from its debarment provisions resident neutral aliens generally. For they, like "treaty aliens", under the general international understanding, have a cognate right to freedom from military service which, petitioner's argument assumes, is somehow infringed upon by the debarment provision. Hence, acceptance of petitioner's argument might well render the debarment provision of Section 3 (a) nugatory, a result which is, of course, always to be shunned. *Unity* v. *Burrage,* 103 U. S. 447, 457; *United States* v. *Tappan,* 11 Wheat. 419, 426.

While a treaty (conventional international law) may well have greater stature and is certainly more specific than "customary" international law, Con-

gress has consistently dealt with treaty neutrals and nontreaty neutrals alike, and its strictly legal power to abrogate the rights of both groups is equal. Accordingly, to urge a construction that would eliminate the debarment where a pre-existing or separate exemption appears, is to urge the inapplicability of the debarment in practically all such cases and, consequently, the flouting of the clear Congressional purpose. See *supra,* pp. 74–75.

III

THE GOVERNMENT IS NOT ESTOPPED FROM INSISTING THAT THE PETITIONER IS DEBARRED FROM CITIZENSHIP

Petitioner contends that in applying for exemption from military service, he committed a "mistake of law * * * induced and shared" by the Government (Br. 25), in effect, that he was lulled into the belief that he would not be barred from citizenship notwithstanding his claim for exemption. *Supra,* p. 73. While he admits that "normally mistake of law will not permit the avoidance of an obligation," he insists that the courts should grant relief where the mistaken action was taken upon the advice of the Government (Br. 25). But petitioner is wrong, firstly, as to the facts, and, secondly, as to the law.

A. THE UNITED STATES GOVERNMENT DID NOT TELL PETITIONER THAT HE COULD CLAIM EXEMPTION FROM SERVICE AND REMAIN ELIGIBLE FOR CITIZENSHIP

It should be noted at the outset that no agency of the United States Government is shown to have

communicated any views to petitioner directly. All correspondence in petitioner's case which emanated from the Government of the United States was directed to Swiss government officials. Moreover, the representatives of the United States Government at no time, either by their statements or by the revision of DSS Form 301, led the Swiss Legation to believe that the course chosen by petitioner to secure his freedom from military service was a procedure through which petitioner would escape the debarment from citizenship. While DSS Form 301 and the Selective Service Regulations were revised in 1943 in response to protests on behalf of "treaty aliens" (see *supra*, pp. 12–15), the Swiss were given no reason to believe that their nationals would thereby be relieved of the consequences of debarment. The informal understandings between the officials of the Department of State, the Selective Service System, and the diplomatic representatives of Switzerland produced a form effective only to avoid any personal waivers or estoppel on the part of Swiss nationals with respect to trying out the issues in the courts. They were freed only from formally acknowledging in writing that their application on Form DSS 301 would preclude them from becoming citizens of the United States. But the revised form (R. 14–15) carried explicit warning of a possibility of debarment.

It was only the full opportunity for judicial

review of the Swiss contention that was sought to be preserved. The Department of State explicitly asserted its desire to have the legal effect of such an application decided at some future date by proper judicial authority. (Appendix, *infra,* pp. A20, A23). And there is no doubt that the Swiss Legation interpreted the matter in this vein. For its letter sent to the petitioner advised him that "The final decision regarding your naturalization," in consequence of the filing of the revised Form DSS 301, "will remain solely with the competent Naturalization Courts" (R. 31).

The finding of the district court that the State Department and the Selective Service System recognized that petitioner had an immunity under the treaty (R. 59–60), even if it were entirely sustained by the evidence,[32] does not support a conclusion that these agencies assumed or conceded the inapplicability of the debarment provision to those having a treaty right to exemption. As pointed out, *supra,* pp. 71–77, recognition of a treaty right to exemption in no way constituted recognition of a concomitant right to be free from the consequence of debarment from citizenship. Indeed, it is clear that the Selective Service Sys-

[32] There is no evidence that Selective Service recognized a "treaty right" to exemption. Compare Appendix, *infra,* pp. A2, A5, A20.

tem and the Department of State treated the problems as distinct.[33]

In short, there is nothing in the record to indicate that the administrative authorities of the United States were in any way mistaken with regard to the legal effects of petitioner's application for exemption from military service, or that they induced an erroneous conclusion as to the law on this matter. There was, at most, a difference of opinion between the Americans and the Swiss as to whether the debarment would apply to persons in petitioner's position.

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[33] As appears from General Hershey's letter in the Appendix, *infra*, pp. A2, A6, "It was always the position of the Selective Service System that the signing of either the original or revised Form 301 clearly brought the alien within the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended December 20, 1941."

And in a communication from the Department of State to the Swiss Legation, quoted *supra*, p. 67, and see Appendix, *infra*, p. A76, the view of that Department is stated, in part, as follows: "While Swiss citizens are exempt from military service, there is no provision in the Treaty relating to the qualifications of nationals of one of the countries to become citizens of the other. Naturalization questions are outside the purpose and purview of the Treaty."

It may be noted that the Board of Immigration Appeals appears to have held that Swiss nationals claiming exemption under the treaty are debarred from citizenship by Section 3 (a) of the Selective Training and Service Act of 1940, as amended. *In re Ernest Walter Kutil*, A-4197506, June 20, 1947; *In re Hans David Lowe*, A-5878178, July 14, 1947. Both of these decisions are summarized in Appleman, *Neutral Aliens Who Claimed Exemption from Military Service* (November 1947), 5 Monthly Review, Immigration and Naturalization Service, pp. 56-59, referred to in peti-

B. THE SWISS GOVERNMENT DID NOT TELL PETITIONER THAT HE COULD CLAIM EXEMPTION FROM SERVICE AND REMAIN ELIGIBLE FOR CITIZENSHIP

Neither the letter to petitioner of February 3, 1944 (R. 19) from the Consulate General of Switzerland, nor the letter of February 18, 1944 (R. 30), from the Legation of Switzerland, contained any assurances to petitioner that he would not be debarred from future naturalization by taking advantage of the Form DSS 301 procedure. The former stated that the Swiss Legation was of the opinion that petitioner was a non-declarant and that his exemption was being requested of the Department of State (R. 19). The latter stated that by claiming exemption petitioner would not waive his "*right to apply*" for citizenship, but that final decision with respect thereto would "remain solely with the competent Naturalization Courts" (R. 31—italics supplied). It is apparent, as pointed out by the Court of Appeals (R. 66), that the "*right to apply*" for citizenship is not synonymous with the right to obtain citizenship. The right to *apply* for citizenship is available to any alien whose application contains the requisite allegations, and the clerks of the courts are required to accept such applications. The right *to obtain* citizenship rests upon the applicant's fulfillment of the statutory requirements and is a matter within the jurisdiction and legal discretion of the Naturalization Court. *In re Halladjian, et al.*, 174 Fed. 834 (C. C. D. Mass.); *Peti-*

tion of Ajlouny, 77 F. Supp. 327, 329 (E. D. Mich.); see also *Tutun* v. *United States,* 270 U. S. 568, 578.

The foregoing distinctions and warnings were not reasonably to be ignored by a man of petitioner's age, education, and experience with the intricacies of citizenship matters. He had availed himself, properly, of the procedure involved in an original entry via Canada, he had had experience with the strict construction of rules in connection with his difficulties in 1940, and he must have been aware at a very early stage of his experience with citizenship forms, that availing one's self of an alien's military exemption was a serious matter, for he had been confronted with the question, "Did you claim exemption during the World War because you were an alien?" See *supra,* pp. 8, note 1, 9.

Nor does it follow from the fact that petitioner claimed "unconditional" relief from military service that such was granted, or that he was led to believe that such was being granted. The form which he executed (R. 14–15) gave him explicit notice that his claim might well result in his debarment from citizenship.

It may be conceded that petitioner waived no treaty rights when he applied for exemption from military service on Form DSS 301, and that his desire ultimately to obtain United States citizenship was, at all times, paramount in his mind. However, the contention that petitioner did not

because the revised form, which he executed, contained no personal waiver of such right, is entirely without merit. Section 3 (a), *supra*, p. 3, as distinguished from the 1918 Act, *infra*, pp. 90–91, contains no requirement for a personal withdrawal of naturalization rights. Its wording is clear and unambiguous. It is susceptible of but one construction, namely, that he who accepts military exemption thereby incurs forfeiture of the privilege of future citizenship. It is not the form by which application for relief is made which results in the statutory disability; it is the act of claiming relief which produces that result, and the result is unaffected by the manner in which the relief is procured. Both revised and unrevised forms clearly put petitioner on notice as to the consequences of his act in executing either form. As the Court of Appeals held (R. 66), the fact that petitioner "did not fully comprehend the legal consequences of his act, through no fault of this government, does not entitle him to any relief from the disability which the statute has made the result of his exemption." See also *In re Tomarchio*, 269 Fed. 400 (E. D. Mo.).

C. THERE CAN BE NO CITIZENSHIP BY ESTOPPEL.

In any event, the United States may not ordinarily be estopped. "At least it is true that no such result would be reached if a strict construction of the Government's act would avoid it." *Sanitary District* v. *United States*, 266

U. S. 405, 427, and cases cited. Particularly is this true when the matter involved is one of "national and international concern." *Ibid.* Moreover, the United States cannot be estopped from asserting its rights in a legal proceeding because of any mistaken or unauthorized action by its officers or agencies. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408–409; *United States* v. *San Francisco,* 310 U. S. 16, 31–32; *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 31; *Jeems Bayon Club* v. *United States,* 260 U. S. 561, 564; *Pine River Logging Co.* v. *United States,* 186 U. S. 279, 291; *Cramer* v. *United States,* 261 U. S. 219, 234.[34]

The doctrine here advanced, of a right to citizenship by estoppel, is a unique one, and the serious consequences of the adoption of any such notion are apparent. "Citizenship is a high privilege and when doubts exist concerning a grant of it, generally at least, they should be resolved in favor

[34] *Staten Island Hygeia Ice & Cold S. Co.* v. *United States,* 85 F. 2d 68 (C. A. 2), upon which petitioner relies (Br. 25–26), was a very different case from that at bar. There, as the court pointed out (p. 71), "the law was no longer in doubt" when a mutual mistake of law was committed by the taxpayer and the collector. The Supreme Court had there previously settled the law and "official information of that decision had been given to internal revenue officers * * *; hence the deputy collector was acting contrary to his duty in demanding payment."

In the present case, the law was in dispute, and, it is submitted, the American administrative view which was taken in opposition to the Swiss was not, in fact, a mistaken one but a correct one.

of the United States and against the claimant." *United States* v. *Manzi*, 276 U. S. 463, 467.

There is a striking similarity between the finding of the district court in this case, that "if in January, 1944, [Moser] had been told that * * * he must face the choice either of serving in the American Army or waive forever his right to become an American citizen, that he would have elected to do the former" (R. 55) and the finding of the district court in *Savorgnan* v. *United States*, 338 U. S. 491, 495, that "petitioner, although intending to obtain Italian citizenship, had no intention of endangering her American citizenship or of renouncing her allegiance to the United States.[35] And the finding in this case can no more aid petitioner than did the finding in her case aid Mrs. Savorgnan.

The opinion of this Court in the *Savorgnan* case is equally apt here (338 U. S. at 499–500): "There is no suggestion in the statutory language that the effect of the specified overt acts [here the claim of military exemption], when voluntarily done, is conditioned upon the undisclosed intent of the person doing them." "The petitioner, in the instant case, was a competent adult." He "voluntarily and knowingly sought and obtained" military exemption. He knew that

[35] "* * * the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress.' *Doreau* v. *Marshall*, 170 F. 2d 721, 724 (C. A. 3d Cir.)" *Savorgnan* v. *United States*, 338 U. S. 491, 502, note 18.

DSS 301 revised "related to [his] citizenship and that [his] signature" on it "was an important condition upon which" his exemption "depended." "On that basis", he was exempted. "Whatever the legal consequences of those acts may be, [he] is bound by them." 338 U. S. at 502.

IV

THE INELIGIBILITY FOR CITIZENSHIP IMPOSED BY SECTION 3 (a) OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, HAS NOT BEEN TERMINATED

Petitioner contends that since the petition for naturalization which began this case was filed after March 31, 1947, the date of the expiration of the Selective Training and Service Act of 1940 (see Section 16 (b), *supra,* p. 4), any ineligibility for citizenship imposed on him in 1944, by his application for military exemption, has been removed (Br. 27–31). But the language of Section 3 (a) clearly shows the permanent nature of the ineligibility intended by Congress, which provided that a neutral alien who claimed exemption from military service "shall *thereafter* be debarred from becoming a citizen of the United States". [Italics supplied.]

The fact that the petition for naturalization in this case was filed after the expiration of the Act is immaterial, for the disability imposed by the statute did not attach to an application for citizenship, but to the applicant. It is a personal

disqualification which survives the exemption as well as the Congressional enactment. The ineligibility for citizenship became complete and final when petitioner applied for and obtained exemption from military service. In view of the purposes of the Selective Training and Service Act, it is inconceivable that the Congress intended the disqualification from citizenship to endure for only the period of hostilities during which the alien enjoyed freedom from military service, and might well temporarily forego citizenship in return for such military exemption. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew* v. *United States,* 144 U. S. 47, 59.

A. CONGRESS INTENDED A PERMANENT DEBARMENT

However, the Congress has not left its purpose to inference. Bars to citizenship have appeared in Section 2 of the Selective Draft Act of 1917, as amended (40 Stat. 76, 884), in Section 3 (a) of the Selective Training and Service Act of 1940, as amended (54 Stat. 855, 55 Stat. 844), and in Section 4 (a) of the Selective Service Act of 1948 (62 Stat. 604; 50 U. S. C. App., Supp. III, 454). Without more, this consistent legislative policy to deny citizenship to neutral aliens who claim exemption from service clearly indicates that Congress intended such bars to be permanent except

where it affirmatively acts to end the bar. This is made particularly clear by the history of the disqualification for citizenship imposed by the Selective Draft Act of 1917, as amended, upon which the statutory provision here in question was modelled.

In 1918, the Senate, sitting as the Committee of the Whole, agreed first to the following proviso (56 Cong. Rec. 8419, 8485):

> And he shall not be entitled to make a new declaration *during the existence of the war in which the United States is now engaged.*[36]

But in accordance with his stated preference for a permanent debarment (56 Cong. Rec. 8416, and see *supra,* p. 54), Senator Lodge, on June 29, 1918, offered an amendment (56 Cong. Rec. 8485) which was subsequently enacted into law as Section 2 of the Act of 1917. It provided that (40 Stat. 885)

> * * * a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration

[36] Italics supplied.

> of intention to become an American citizen and he shall *forever* be debarred from becoming a citizen of the United States. [Italics supplied.]

Petitioner cannot read the comparable provision in the 1940 Act as accomplishing what Congress specifically decided not to do.

There was no specific statute terminating the World War I Selective Draft Act. The local boards organized under that statute ended their activities on December 10, 1918, and their records were thereafter sealed. Second Report of Provost Marshal General (1919), p. 3. The only legislative termination appears to have been accomplished by Public Resolution 64 of March 3, 1921, 41 Stat. 1359, which was the resolution ending World War I and terminating statutes which were dependent upon the continuation of that conflict.[37]

However, by subsequent legislation the Congress again clearly indicated that it regarded the bar to citizenship incurred by neutral aliens under Section 2 of the 1917 Act as remaining in

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[37] A proviso, 41 Stat. 1360, stipulated, "That nothing herein contained shall be construed as effective * * * to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statutes, p. 76), of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof."

effect indefinitely, notwithstanding the general expiration of that statute. In Section 28 (c) of the Immigration Act of 1924 (43 Stat. 153, 168, 8 U. S. C. 224 (c)), Congress defined the phrase "ineligible to citizenship" for the purpose of that statute as including any alien ineligible for citizenship under Section 2 of the Selective Draft Act of 1917, as amended.[38] In 1925, the ineligibility to citizenship was carried into the United States Code as Section 366 of Title 8. In 1931, Congress again recognized the continuing nature of the ineligibility by limiting its future application to those neutral aliens who had applied for exemption up to and including November 11, 1918 (46 Stat. 1087).[39] The enduring nature of the debarment was expressly recognized by both the House and Senate Committees which considered the 1931 legislation, as evidenced by their Reports. H. Rep. 910, S. Rep. 923, 71st Cong., 2d sess. It was not until 1940, that the Congress,

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[38] Under Section 13 (c) of the Immigration Act of 1924 (8 U. S. C. 213 (c)), such aliens were excluded from the United States. See *supra*, note 28, p. 72.

[39] The Act of February 11, 1931, 46 Stat. 1087, which was codified as 8 U. S. C. (1934 ed.) 366a, reads as follows:

"That, notwithstanding any provision of law to the contrary, no alien shall be debarred from becoming a citizen of the United States on the ground that he withdrew his intention to become a citizen of the United States in order to secure discharge from the military service, if such withdrawal (and the application therefor) and discharge took place after November 11, 1918."

in Section 504 of the Nationality Act (54 Stat. 1137, 1172; 8 U. S. C. 904) specifically repealed the debarment.[40] In 1945, Congress acted consistently with this repeal (Act of October 29, 1945, 59 Stat. 551) by amending the definition of the phrase "ineligible to citizenship" in Section 28 (c) of the Immigration Act of 1924, so as to eliminate the reference to neutral aliens who had claimed exemption from military service under the Selective Draft Act of 1917. It should be noted, however, that the lower courts have been divided as to whether even the 1940 repealer terminated the disqualification. *Petition of Otness,* 49 F. Supp. 220 (N. D. Cal.) holding the disqualification to be removed; contra, *In re Urmeneta,* 42 F. Supp. 138 (E. D. Wis.), and *In re Samowich,* 70 F. Supp. 273 (W. D. Wash.). The significant thing is that the Congress considered that the ineligibility for citizenship imposed by the Selective Draft Act survived the expiration of that statute and continued until specifically terminated by the Congress.

There is no evidence of any contrary purpose in the history of the Selective Training and Service Act of 1940. Section 16 (b) of the 1940 Act originally declared that the Act was to become inoperative on May 15, 1945. But there is not even the slightest evidence that by setting

[40] See Immigration and Naturalization Service, Interpretation No. 1, June 5, 1941.

this time limitation Congress wished to expunge a disqualification which had previously been incurred. On the contrary it seems evident that Congress looked to the future and that it sought to chart a terminal point beyond which the selective service machinery would no longer be needed. This expectation proved premature and, on May 9, 1945, the expiration date was postponed one year. 59 Stat. 166. Another short extension, 60 Stat. 181, was followed by the last amendment on June 29, 1946, 60 Stat. 342, which set the expiration date at March 31, 1947.[41] It is on this last extension that petitioner relies. But he has not only overlooked the purpose Congress sought to fulfill in prescribing and extending this expiration date, but has also ignored the failure of Congress specifically to remove the ineligibility of neutral aliens who claimed exemption under the 1940 Act, while taking just such action in 1940 with respect to aliens who claimed exemption under the 1917 Act. See *supra,* pp. 92–93. The conclusion is inescapable that Congress intended continuing ineligibility for citizenship as a consequence for neutral aliens availing themselves of exemption from military service.

[41] Although the statute was allowed to expire on that date the absence of selective service legislation endured only for a brief period. The following year witnessed the enactment of a new Selective Service Act of 1948, containing many similar provisions.

B. THE DEBARMENT IS NOW EMBODIED IN THE PERMANENT IMMIGRATION LAW

Any doubt as to the Congressional purpose in this matter must be dispelled by the fact that on October 29, 1945, Congress enlarged the definition of the "ineligible to citizenship" class, found in Section 28 (c) of the basic Immigration Act of 1924 (59 Stat. 551, 8 U. S. C. 224 (c)) by including therein those disqualified by Section 3 (a) of the Selective Training and Service Act of 1940. This action was inconsistent with any assumption that Congress regarded the debarment as repealed. The very act of making the debarment a criterion of a permanent law, following the termination of the armed conflict and when the Selective Training and Service Act was due to expire, manifests a Congressional intent to treat it as an enduring bar, like that imposed by the 1917 Act. It was in this 1945 Act of Congress that the Court in *Benzian* v. *Godwin,* 168 F. 2d 952, 955 (C. A. 2), certiorari denied, 335 U. S. 886, found an intent to continue the debarment from citizenship beyond the expiration of the Act of 1940.

C. 1 U. S. C. 109 SUPPORTS THE CONCLUSION THAT THE DEBARMENT CONTINUES

An important element in arriving at an evaluation of the Congressional design is found in 1 U. S. C., Supp. III, 109, formerly R. S. 13 and 1 U. S. C. 29, which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, *unless the temporary statute shall so expressly provide,* and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. [Italics supplied.]

In the light of this enactment, it is irrelevant to refer to a supposedly contrary common-law rule. For any such rule has been superseded since 1871 by this specific legislation, which must be regarded as a general saving clause to be read into all repealing statutes. *Hertz* v. *Woodman,* 218 U. S. 205, 218; *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, 465. Even when the repealing statute itself has a specific saving clause, the provisions of 1 U. S. C., Supp. III, 109 cannot be disregarded. Both saving clauses must be read and applied together, and the general clause

of Section 109 will yield to the later specific clause only in the event of inconsistency. *Ibid.* Here there is no inconsistency between 1 U. S. C., Supp. III, 109 and the provisions of Section 16 (b) of the Selective Training and Service Act, as amended. Since there is no specific legislative directive ending the ineligibility of neutral aliens who claimed exemption from military service, their disability survived repeal of the statute. See *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5).

The reservation of "penalties, forfeitures, and liabilities" in 1 U. S. C., Supp. III, 109 necessarily encompasses the forfeiture of the privilege of naturalization which had attached to petitioner. *United States* v. *Reisinger,* 128 U. S. 398, rejected the contention that this language did not reach criminal penalties, and later cases have affirmed the converse—that this saving clause does operate to continue civil liabilities and disabilities not expressly terminated. *Hertz* v. *Woodman,* 218 U. S. 205, 218; *United States* v. *Carter,* 171 F. 2d 530 (C. A. 5).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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MARCH 1951.

APPENDIX

FEBRUARY 1, 1951.

ALEXANDER NUTA, ESQ.
Assistant General Counsel,
Room 502, Selective Service System,
Washington, D. C.

DEAR MR. NUTA: The Supreme Court has requested that in *Moser* v. *United States,* October Term 1950, No. 301, we advise the Court, *inter alia,* as to the practice under the Selective Training and Service Act of September 16, 1940, as amended December 20, 1941, in dealing with citiens of countries with whom the United States had treaties similar to the Convention of Friendship, etc., between the United States and the Swiss Confederation, concluded November 25, 1850, and proclaimed November 9, 1855 (11 Stat. 587, 589). We would appreciate a statement setting forth all available information (together with copies of pertinent records and correspondence) as to the practice with respect to Swiss subjects residing in the United States and seeking exemption under Section 3 (a) of the Act, and with respect to subjects of other countries involving similar treaties in seeking such exemption.

Sincerely yours,

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1712 G. STREET NW.,
Washington 25, D. C.

FEBRUARY 13, 1951.

In Replying Address
The Director of Selective Service
And Refer to No.
6-59-1

MR. PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

DEAR MR. PERLMAN: This will reply to your letter of February 1, 1951, requesting a statement regarding selective service practice in dealing with citizens of countries with whom the United States had treaties similar to the Convention of Friendship, etc., concluded November 25, 1850, between the United States and the Swiss Confederation, in administering the provisions regarding aliens of the Selective Training and Service Act of 1940, as amended.

This Act, as originally enacted September 16, 1940, provided in Section 3 (a) "Except as otherwise provided in this Act, every male citizen of the United States and every male alien residing in the United States who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States."

Section 5 (a) of the Act enumerated as those aliens to be exempt from registration and service, diplomatic representatives, technical attachés of foreign embassies and legations, consuls general, consuls, vice consuls, and consular agents of foreign countries, residing in the United States, who were not citizens of the United States, and who had not declared their intention to become citizens of the United States.

With the entry of the United States into the war following Pearl Harbor, the alien residing in the United States took on greater importance, both as an available source of manpower and as a possible menace to our national security. The Congress took cognizance of these facts and on December 20, 1941, amended the Selective Training and Service Act of 1940 in regard to the liability of aliens for military service. As amended December 20, 1941, Section 3 (a) reads as follows:

> "Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of twenty and forty-five at the time fixed for his registration, or who attains the age of twenty after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States: Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and

in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: Provided further, That no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act unless he is acceptable to the land or naval forces.

Section 5 (a) was amended by inserting a comma after the words "foreign countries" following the enumeration of the aliens to be exempt from registration and service and adding the phrase "and persons in other categories to be specified by the President."

Neither the Selective Training and Service Act of 1940, under which the Selective Service System operated until it expired on March 31, 1947, nor the Selective Service Regulations contained provisions, either as originally enacted or as amended, for the exemption of any alien by reason of a treaty provision. This Act provided a way for the exemption of aliens who are subjects, nationals or citizens of neutral countries and all citizens of neutral countries were treated in the same way in the application of the Selective Service Law regardless of whether or not the alien's neutral country had a treaty with the United States relating to military service of its subjects while in the United States.

The Department of State transmitted from time to time communications from foreign embassies and legations of cobelligerent and

neutral countries to National Headquarters of the Selective Service System requesting that an alien be relieved from military obligations by reasons of the provisions of a treaty.

Selective Service never considered the alien's right to exemption to rest on the fact that he was a treaty alien but considered the status of his country in the war, as to whether it was a co-belligerent, neutral, or enemy nation. However, if the alien was a subject of a neutral country with which the United States had a treaty providing for military exemption, his local board through the Director of Selective Service for the State in which the local board was located was informed by a form letter (Form Letter No. 12, copy attached) that a claim had been made for his exemption under the terms of a treaty, and that as a *neutral alien* he was entitled to file an Application by Alien for Relief from Military Service (Form 301).

Selective Service advised the Department of State by form letter (Form Letter No. 11, copy attached) that the alien's local board was being instructed to inform him that he might obtain from his embassy or legation an Application by Alien for Relief from Military Service (Form 301, Revised).

The original Form 301 referred to in Form Letter No. 12 as the "old Form 301 (16–26414–1)" was approved December 31, 1941. This Form 301, which was printed on one page, contained a statement near the center of the page and above the place for the registrant's signature, which had to be attested before a notary public, as follows: "I understand that the making of this ap-

plication to be relieved from such liability will debar me from becoming a citizen of the United States."

Because of the objections of some neutral aliens to having this statement above their attested signature, this form was revised on March 16, 1943, to eliminate the statement. Instead there was added near the bottom of the form (Form 301, Revised) below the place for the alien registrant's signature the provision in Section 3 (a) of the Act that a neutral alien who requested relief from military service would be debarred from future citizenship.

The deletion from the original form above referred to was not considered by Selective Service to constitute a recognition of any special right in a treaty alien. It was always the position of the Selective Service System that the signing of either the original or revised Form 301 clearly brought the alien within the provisions of Section 3 (a) of the Selective Training and Service Act of 1940, as amended December 20, 1941. Every Form 301 signed by a neutral alien was processed in the same manner and the original thereof was sent to the Immigration and Naturalization Service of the Department of Justice as evidence that the particular alien had secured an exemption from liability from military training and service solely by reasons of the provisions of Section 3 (a) of the Act.

Due to a mistake in proposing the revision of this form, it was first printed without the statement of the law at the bottom. This mistake was discovered shortly after the revised version was

returned to Selective Service Headquarters by the printer and, so far as can now be recalled, this version was never used since it was not considered fair to the alien to let him sign a form that carried no notice or reference to the fact that such action would debar him from future citizenship in the United States.

The Revised Form 301 approved and used by Selective Service carried the statement of the law and this is the Revised Form 301 referred to in both Form Letters Nos. 11 and 12 to be used by all neutral aliens who desired to sign it. The old Form 301 had been printed in quantity and all local boards had a supply of these forms. For economical reasons only a small number of the revised form was issued and it was to be used only in those cases in which the neutral alien requested it until the supply of the old form was exhausted. However, any neutral alien could use the revised Form 301, whether or not his country had a treaty with the United States.

Selective Service took the position that the type of form used by the neutral alien to apply for relief from military service was immaterial, just so it was the form prescribed by the President, as the law was clear and unequivocal that such action would debar the alien from future citizenship in the United States.

No agreement, either written or verbal was ever made by Selective Service with the Department of State or any foreign embassy or legation to recognize treaty rights relative to military service or to give any different or preferred treatment to the nationals of any country by reason

of the fact that a treaty existed. All aliens of neutral countries were treated the same under similar circumstances in accordance with the provisions of the Selective Training and Service Act of 1940, as amended, and the regulations prescribe for its administration.

Sincerely yours,

LEWIS B. HERSHEY,
Director.

(Form Letter No. 11)

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, NW.
Washington 25, D. C.

The Honorable
The SECRETARY OF STATE

Subject: (Registrant's Name)
Local Board No.
(Address)
Your reference:

MY DEAR MR. SECRETARY: Reference is made to your letter of (Date), regarding the above-named registrant.

We are instructing his local board to inform him that he may obtain from the (Embassy or Legation) an Application by Alien for Relief from Military Service (Form 301, Revised), which form has previously been approved by you.

Sincerely yours,

DIRECTOR.

931169—51——8

(Form Letter No. 12)

NATIONAL HEADQUARTERS

SELECTIVE SERVICE SYSTEM

21ST AND C STREETS NW.

Washington 25, D. C.

State Director of Selective Service
(Address)

Subject: (Registrant's Name)
Local Board No.
(Address)

DEAR ———: The above-named registrant claims exemption from service in our armed forces under the terms of a treaty between the United States and (Country) of which latter country he states he is a national. As a neutral alien he is entitled to file an Application by Alien for Relief from Military Service (Form 301).

He may obtain an old Form 301 (16–26414–1) from the local board, or he may obtain a revised Form 301 (16–33666–1) from the (Embassy or Legation) for execution and filing by him with the local board.

Until the supply on hand is exhausted the old Form 301 may be used by the local boards in accordance with section 622.43 of the Regulations. However, if a special request is made by a registrant for a revised Form 301, he may secure it by application either to his Embassy or Legation,

or to National Headquarters through his local board.

For the Director,

(Officer's Name)
(Rank)
Foreign Liaison Section,
Manpower Division.

SS:MJB

D. J. File No.
38-52-0

FEBRUARY 1, 1951.

ADRIAN FISCHER, ESQ.
Legal Adviser,
Department of State,
Washington 25, D. C.

DEAR MR. FISHER: The Supreme Court has requested that in *Moser* v. *United States,* October Term 1950, No. 301, we bring to the Court's attention the records of the preparatory work available in the Department of State concerning the negotiations leading to the execution of the Convention of Friendship, etc. between the United States and the Swiss Confederation, concluded November 25, 1950 and proclaimed November 9, 1855, and that we advise the Court (1) whether the United States has similar treaties in addition to those with Spain (33 Stat. 2105, 2108), Costa Rica (10 Stat. 916, 921), Argentina (10 Stat. 1005, 1009), and Paraguay (12 Stat. 1091) and (2) what the practice was under the Selective Training and Service Act in dealing with citizens of countries with whom the United States had such treaties.

Mr. Bishop, of the Department of Justice, has been furnished some copies of file materials by your Mr. Yingling, and a copy of a letter to counsel for the petitioner, summarizing some of the facts. But this material, of course, does not represent a definitive statement of the record at the Department of State. We would accord-

ingly appreciate a full statement of the record and copies of file materials pertinent to the above questions, with the understanding that such statement and copies, and the copies heretofore furnished to Mr. Bishop, may be included in the brief to the Court, to the extent deemed relevant.

Sincerely yours,

PHILIP B. PERLMAN,
Solicitor General.

In reply refer to
L/EUR 711.5511-F/1-551

DEPARTMENT OF STATE,
Washington, February 19, 1951.

The HON. PHILIP B. PERLMAN,
Solicitor General.

MY DEAR MR. SOLICITOR GENERAL: This is in reply to your letter of February 1, 1951, requesting certain information for which the Supreme Court asked in *Moser* v. *United States,* October Term, 1950, No. 301.

Request for exemption from military service under the Selective Training and Service Act of 1940 concerned for the most part nationals of Switzerland, although there were some exemptions claimed for Costa Ricans and Spaniards. The practice was for the Mission (Embassy or Legation) in Washington of the country concerned to address an informal note to the Secretary of State requesting the exemption, under pertinent treaty provisions, of one or more of its nationals registered for Selective Service. It was the practice of the Swiss Legation to claim the exemption only in behalf of non-declarant Swiss citizens, although there was no such distinction in the applicable treaty. Costa Rica claimed exemption for both declarants and non-declarants.

On the receipt from a Mission of a request for exemption, the Department of State would address a letter to General Hershey, Director of Selective Service, advising him of the request and stating the Department's view that under the treaty in question the alien was exempted from military service. The Director was asked to ad-

vise the Department of the result of his investigation of the case or cases referred to in the Mission's note and of the action taken thereon in order that the Mission might be informed. Subsequently, General Hershey would inform the Department that the registrant's local board was being directed to instruct him to apply to the Mission for a revised Selective Service Form 301 which had previously been approved by the Department of State and which each such registrant was required to execute and file with his local board. Thereupon the Department would inform the Mission that the Director of Selective Service had directed the registrant's local board to instruct the registrant to apply to the Mission for a DSS Form 301 to be executed and filed with his local board. Supplies of the revised DSS Form 301 were furnished to the Mission by the Director of Selective Service through the Department of State.

The revised DSS Form 301 was used only by aliens claiming exemption under a treaty. The original DSS Form 301 which was an application for relief from military service to be signed by the neutral alien contained the statement "I understand that the making of this application to be relieved from such liability (for military service) will debar me from becoming a citizen of the United States." It was the position of the Swiss Legation that its citizens were entitled under the treaty to unconditional exemption from military service and that they should not, therefore, be debarred from becoming citizens of the United States for claiming the treaty right. In order that the applicant for exemption under the treaty

might not be compromised in any future claim to American citizenship by having signed an application containing the statement quoted above, the Department and the Selective Service System agreed upon a revised form to be used by persons claiming exemption under a treaty, which form omitted the indicated statement. Thus, the alien was left free to assert his claim in the courts that he was not barred from becoming a citizen for having claimed his treaty right. The Department has on different occasions orally advised representatives of the Swiss Legation that only the courts could definitely decide whether the barring provisions of the Selective Training and Service Act were applicable to aliens entitled to exemption from military service by treaty.

In addition to treaties similar to the Swiss treaty, heretofore brought to your attention, additional treaties providing for service by declarants remaining in residence in the country in event of a war with a third power, are in existence with respect to Honduras, 45 Stat. 2618; El Salvador, 46 Stat. 2817; Norway, 47 Stat. 2135, 2139; Estonia, 44 Stat. 2379; Germany, 44 Stat. 2132; Hungary, 44 Stat. 2441; Latvia, 45 Stat. 2641; Liberia, 54 Stat. 1739; and Austria, 47 Stat. 1876.

We enclose copies of various letters and memoranda that may be considered with the foregoing summary.

Sincerely yours,

For the Secretary of State:

ADRIAN S. FISHER,
The Legal Adviser.

(Copy to Mr. Wasserman)

[List of enclosures omitted in printing.]

JANUARY 22, 1951.

In reply refer to
L/EUR 711.5511-F/1-551

Mr. JACK WASSERMAN,
Counsellor at Law,
WARNER BUILDING, WASHINGTON 4, D. C.

MY DEAR MR. WASSERMAN: I have received your letter of January 5, 1951, concerning the case of *Moser* v. *the United States* in which certiorari has been granted by the Supreme Court of the United States. You request the Department's assistance in obtaining the following material and information requested by the Court in connection with the case:

(1) Preparatory work concerning the negotiations leading up to the conclusion of the Treaty of Friendship, Commerce and Navigation of 1850 between the United States and Switzerland;

(2) Names of countries other than Switzerland with which this country has treaties containing provisions for reciprocal exemption from military service; and

(3) The practice under the Selective Training and Service Act of 1940 in dealing with citizens of countries with which the United States had treaties similar to the Swiss treaty.

With respect to the Court's first request, you are advised that the records of the negotiations leading up to the conclusion of the Treaty of Friendship, Commerce and Navigation of 1850

between the United States and Switzerland are to be found in the National Archives and that you may arrange to examine them by consulting Mrs. Carroll, Room 5 E, Foreign Affairs Section, National Archives. There is also considerable material regarding the negotiation of this treaty in Hunter Miller's *Treaties and Other International Acts of the United States of America* (U. S. Government Printing Office, 1937).

In respect to the Court's second inquiry, you are advised that this Government has concluded treaties containing provisions regarding military service similar to that contained in the Swiss treaty with the following countries: Argentina, China, Costa Rica, Ireland, Italy, Paraguay, Thailand, Spain, and Yugoslavia. The treaties with China, Ireland, and Italy were concluded subsequent to the enactment of the Selective Training and Service Act of 1940.

In response to the third question raised by the Court, the Department desires to point out that a procedure was worked out between it and Selective Service whereby the Embassy or Legation of the country of which an alien was a national would transmit to the Department an application for the alien's exemption on the basis of the treaty with that country. If the Department was satisfied that the treaty was applicable and approved the application, it would transmit such application to National Selective Service Headquarters, with the statement that it had been approved. The latter would thereupon notify Selective Service Headquarters of the particular state in which the alien was registered and the state headquarters would in turn notify the

alien's local board. The same procedure was followed with respect to nationals of the other countries with which treaties had been concluded as was followed in the case of Swiss nationals. However, it does not appear that the treaty provisions were invoked by all the countries concerned.

Sincerely yours,

RAYMUND T. YINGLING,
Assistant Legal Adviser.

MARCH 21, 1946.

VD:

Swiss citizens in the United States are exempted from military service under the provision of Article II of the Convention of Friendship, Commerce and Extradition of November 25, 1850. This exemption was claimed by the Swiss Legation in behalf of many Swiss citizens during the war. The Selective Service System refused to acknowledge the right to the exemption on treaty grounds but granted the exemption under the provisions of Section 3 (a) of the Selective Service Act. The Department admitted the treaty right to exemption and requests of the Legation for the exemption were forwarded to the Selective Service System. In order that Swiss citizens might claim the exemption and reserve their position as to the effect of Section 3 (a) of the Selective Service Act on their right to become citizens, Form 301 was revised by the Selective Service System to its present form in which the alien merely claims exemption from military service without indicating the basis of the claim. At the bottom of the form below the applicant's signature the pertinent provisions of Section 3 (a) of the Selective Service Act are quoted.

The Swiss Legation has been informed on numerous occasions by the Department that the effect of a claim to exemption from military service on the Swiss citizen's right to become an American citizen can only be determined definitively by the courts. In order that the Consul

at Zurich may have a complete picture of the situation it is suggested that he should be informed of the foregoing facts. No opinion is expressed as to the right of a Swiss citizen who filed a Form 301 in the above circumstances to admission into the United States as an immigrant.

Le: RTYingling:hr
811.111 Lavanchy, Paul J.

SEPTEMBER 27, 1949.

In reply refer to
L/M 811.2222F/9-1649

MR. A. R. MACKEY,
Acting Commissioner,
IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE.

MY DEAR MR. MACKEY: The Department has received your letter of September 16, 1949 (Reference: A–4906863) stating that you have under consideration the question of instituting appellate proceedings from the judgment of the United States District Court for the Eastern District of New York admitting to citizenship one Paul Moser, a former national of Switzerland, who executed an application for exemption from military service (Form DSS 301) which was granted. You refer further to certain representations made by Mr. Moser's counsel to the court concerning the Form DSS 301 executed by aliens who were entitled to exemption from military service by treaty and you request any information concerning the matter which the Department may be able to furnish.

Under the provisions of Article II of the Convention of Friendship, Commerce and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service. In view of these treaty provisions, Swiss nationals felt that they should not be penalized for claiming their treaty rights by being debarred from becoming citizens of the United States and

were reluctant to sign Form DSS 301 which contained the printed statement that:

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States.

Representatives of the Swiss Legation were advised informally by representatives of the Department that the right of a Swiss national who claimed and was granted exemption from military service during the war could only be decided definitively by the courts, but in order that the Swiss national's case would not be prejudiced by signing a DSS Form 301 containing the above-quoted statement, the Selective Service System permitted Swiss nationals and other aliens in a similar position to sign a revised DSS Form 301 prepared in accordance with informal understandings with the Department of State, which revised form omitted the quoted statement and substituted therefor:

> I hereby apply for relief from liability for training and service in the land or naval forces of the United States.

However, the revised form 301 quoted Section 3 (a) of the Selective Training and Service Act of 1940, as amended, beneath the signature of the applicant for relief from military service.

It is hoped that the above explanation will clarify the situation and will enable the Department of Justice to decide what position it should take in the Moser case. The Director of Selective Service can, no doubt, furnish copies of the forms referred to above.

Sincerely yours,

For the Secretary of State:

RAYMUND T. YINGLING,
Assistant Legal Adviser.

L:L/M:RTYingling:bd
9/26/49

LEGATION DE SUISSE,
Washington, D. C.

The Minister of Switzerland presents his compliments to the Honorable the Secretary of State and with further reference to the Secretary's note of July 6, 1942, concerning the liability of Swiss nationals for military service in the United States, has the honor to submit the following additional cases of non-declarant Swiss citizens for unconditional release from the liability for military service, in conformity with Article II of the Treaty of Friendship, Commerce and Extradition of November 25, 1850:

1. *Max G. Mueller,*
   Address: 405 East 54th Street, New York City.
   Order number 11580,
   Local Board: No. 40, 139 East 57th Street, New York City.
2. *Robert M. Syz,*
   Address: 310 East 44th Street, New York City.
   Order number 2462,
   Local Board: Room 1004, 231 Madison Avenue, New York City.
3. *Robert Knittel,*
   Address: Wavertree Hall, Greenwood, Va.
   Order number 695–A,
   Local Board: No. 31, 67 East 59th Street, New York City.
4. *Walter Wisler,*
   Address: (old) Ritz Tower, Park Avenue at 57th St., New York City.

931169—51——9

(new) Brazilian Court Hotel
Brazilian Ave. at Hibiscus, Palm Beach, Fla.

Order number 2821,
Local Board: No. 31, 67 East 59th St., New York City.

DEPARTMENT OF STATE,
Washington.

NEW YORK CITY.

5. *Gilbert Vasserot,*
Address: 823 Seneca Street, Seattle, Wash.
Order number 3747,
Local Board: No. 260, 136–50 Roosevelt Ave., Flushing, N. Y.

6. *Xavier J. Rust,*
Address: 126 Midland Avenue, Syracuse, N. Y.
Order number 2269,
Local Board: No. 258, College Point, L. I., N. Y.

7. *Arthur Weibel,*
Address: 25 Bronson Avenue, Scarsdale, N. Y.
Order number 12017,
Local Board: No. 743, Scarsdale, N. Y.

8. *Erich A. Fischer,*
Address: 60 Beaver Street, Room 1206, New York, N. Y.
Order number 3433–A,
Local Board: No. 9, 2227 M Street NW., Washington, D. C.

9. *George Henri Thorel,*
Address: 601 North Isabel Street, Glendale, Cal.
Order number 334,
Local Board: No. 181, 2313 Honolulu Ave., Montrose, Cal.

10. *Eligio Tunzi,*
    Address: P. O. Greenfield, Cal.
    Order number 883,
    Local Board: No. 121, City Hall, King City, Cal.
11. *Amatore (Armando) Lotti,*
    Address: 629 18th Street, Oakland, Cal.
    Order number 47,
    Local Board: No. 72, Townhall, Park Avenue, Emeryville, Cal.
12. *Armand Cosandey,*
    Address: 304 N. Main Street, Galax, Va.
    Order number 2602,
    Local Board: No. 1, 3010 Kahl Building, Davenport, Iowa.

The required letters of the above registrants to the Director, Selective Service System, in which they request to be unconditionally relieved of the liability for military service under the provisions of Article II of the Treaty of 1850, are herewith enclosed.

The Minister would appreciate being informed of the final disposition of these cases.

Mr. Kurt R. Schneider, whose case was submitted with note of October 15th, informed the Legation that in order not to be inducted into the United States Armed Forces, he had in the meantime been required by his Local Board (No. 242, 6233 Hollywood Boulevard, Hollywood, California) to file Selective Service Form 301 "Application by Alien for Relief from Military Service", which exempted him from the obligation for military service, with the consequence, however, that he will be debarred forever from becoming an American citizen.

The Minister would appreciate it if the Secretary would ask the competent authority to have this form returned to Mr. Schneider.

12 Enclosures.

WASHINGTON, D. C., *November 11, 1942.*

NOVEMBER 23, 1942.

In reply refer to
Le 811.2222 (1940)/2116

Maj. Gen. LEWIS B. HERSHEY,
Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I am enclosing a copy of a note of November 11, 1942, and its enclosures, from the Legation of Switzerland claiming the exemption from military service under the provisions of the Selective Training and Service Act of 1940 of certain persons listed therein who are said to be non-declarant aliens of Swiss nationality.

The Department has previously expressed the view that under the provisions of Article II of the Treaty of Friendship, Commerce, and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service. I shall appreciate being advised of the result of your investigation of the cases referred to in the Legation's note and of the action taken thereon in order that the Legation may be informed.

Sincerely yours,

For the Secretary of State:

GREEN H. HACKWORTH,
Legal Adviser.

Enclosures:
From Legation of Switzerland,
November 11, 1942, with
enclosures.

Le: RTY: MMM: SS
11/17/42

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and acknowledges the receipt of his note of November 11, 1942 containing an additional list of non-declarant Swiss nationals for whom exemption from military service is claimed.

The cases have been referred to the appropriate agency of the Government for investigation and upon the receipt of a report thereon the Secretary of State will again communicate with the Minister.

DEPARTMENT OF STATE,
Washington, November 23, 1942.

811.2222 (1940)/2116
Le: RTY: MMM: SS 11/17/42

(A30)

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and refers to his note of November 11, 1942, containing a list of non-declarant Swiss nationals for whom exemption from military service was claimed.

The Secretary of State is now advised by the Director of Selective Service, to whom the cases were referred for investigation, that the respective local boards of the registrants listed in the Legation's note are being directed to instruct the registrants to apply to the Legation for a DSS form 301 which each registrant is required to execute and file with his local board.

DEPARTMENT OF STATE,
Washington, April 9, 1943.

811.2222 (1940)/2116
Le:RTY:HJG:SS
4/6/43

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N.W.
Washington, D. C.

MARCH 5, 1943.

In replying address
The Director of Selective Service
and refer to No.
9-2.23-97

The Honorable
The SECRETARY OF STATE

Subject: Emil Digglemann
Max Jakob Ackermann
Werner Paul Kuoni
Carlos Riggenbach
Robert Torner
Emil Thut
Leonhard Wuest
Hans Sarbach
Augusto Adeglio Scattini
Achille Carlo Tamagni
Beat William Buol

MY DEAR MR. SECRETARY: Further reference is made to your letter of September 11, 1942 (Your reference: Le 811.2222 (1940)/1560), transmitting a copy of a note dated September 5, 1942, and its enclosures from the Legation of Switzerland concerning the above registrants who claim to be exempt from military service in the United States by reason of a treaty between the United States and Switzerland.

We are this date returning the files of the above registrants to their local boards for proc-

essing in the normal manner. The previous orders to the local boards staying induction have been rescinded and these registrants have been or will be classified in the same manner as all other registrants. However, inasmuch as these registrants appear to be citizens of a neutral country, they may be relieved from liability for military service in accordance with section 622.43 of the Selective Service Regulations, as amended, if they file with their local boards at any time before they are actually inducted an Application by Alien for Relief from Military Service (Form 301), executed in duplicate.

The Selective Service System is unable to predict the effect that filing such an application might have on a registrant's subsequent petition for naturalization. We have, however, revised Form 301 and section 622.43 of the Selective Service Regulations, omitting any reference to the citizenship debarment provisions of section 3 (a) of the Selective Training and Service Act of 1940, as amended.

There are enclosed several copies of Form 301 which you may wish to forward to the Legation. Should any of the above registrants desire to be relieved from liability for training and service, they should execute such Forms in duplicate and return both copies to their local boards. The local boards are being advised to process these cases in accordance with Selective Service Regulations.

Sincerely yours,

LEWIS B. HERSHEY,
Director.

Enclosures

Budget Bureau No. 33–R046–43
Approval expires January 31, 1944

(LOCAL BOARD DATE STAMP WITH CODE)

APPLICATION BY ALIEN FOR RELIEF FROM MILITARY SERVICE

STATE OF _____ }
COUNTY OF _____ } ss:

I, _____ _____ _____
(First name) (Middle name) (Last name)
do solemnly swear—or affirm—that I am a citizen or subject of _____; I am a registrant of Local Board
(Country)
_____, _____, _____, _____;
(Number) (City) (County) (State)
my alien registration number is _____; I _____
(have) or (have not)
declared my intention to become a citizen of the United States; my declaration of intention to become a citizen of the United States is No. _____, and was filed in the _____ Court at _____, _____, _____,
(City) (County) (State)
on _____, 19____
(Month and day)

I hereby apply for relief from liability for training and service in the land or naval forces of the United States.

Dated this _____ day of _____, 194__

Subscribed and sworn before me this _____ day of _____, 194__

_____
(Signature of registrant)

_____
(Signature of officer)

_____
(Designation of officer)

INSTRUCTIONS

This form should be executed by the registrant in duplicate. The local board will transmit the original to the Director of Selective Service through the State Director of Selective Service and will retain the duplicate in the registrant's Cover Sheet (Form 53). (See section 622.43 (b) of the Selective Service Regulations.)

DSS Form 301 (Revised 1–2–43.)

U. S. Government Printing Office 16—26414–2

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N.W.
Washington, D. C.

MARCH 6, 1943.

In replying address
The Director of Selective Service
and refer to No.
11-3.2-106

The Honorable
The SECRETARY OF STATE

Subject: Hermann Gregoire Rusch
Local Board No. 248
Elmhurst, Long Island
New York

MY DEAR MR. SECRETARY: Reference is made to your letter of February 20, 1943, your reference le 811.2222(1940)/3326, transmitting a copy of a note dated February 9, 1943, and its enclosures from the Legation of Switzerland concerning the above registrant who claims to be exempt from military service in the United States by reason of a treaty between the United States and Switzerland.

We are enclosing two copies of Application by Alien for Relief from Military Service (Form 301, Revised), which we believe is a proper application for relief whether on the basis of a treaty or of the provisions relating to neutrals, section 3 (a) of the Selective Training and Service Act of 1940, as amended. It will be noted that the revised form makes no reference to the fact

that the applicant will be debarred from becoming a citizen of the United States. The Selective Service System is unable to predict the effect that the filing of such application may have on the registrant's subsequent petition for naturalization.

If the registrant contemplates the filing of such form, he should present the same properly executed to the local board immediately since he will otherwise be classified in the same manner as other registrants.

Sincerely yours,

(S) LEWIS B. HERSHEY,
Director.

Enclosure: 2 copies Form 301, Revised.

Budget Bureau No. 33–R046–43
Approval expires January 31, 1944

(LOCAL BOARD DATE STAMP WITH CODE)

APPLICATION BY ALIEN FOR RELIEF FROM MILITARY SERVICE

STATE OF _____
COUNTY OF _____ } ss:

I, _____ _____ _____
(First name) (Middle name) (Last name)
do solemnly swear—or affirm—that I am a citizen or subject of _____ (Country); I am a registrant of Local Board _____ (Number), _____ (City), _____ (County), _____ (State); my alien registration number is _____; I _____ (have) or (have not) declared my intention to become a citizen of the United States; my declaration of intention to become a citizen of the United States is No. _____, and was filed in the _____ Court at _____ (City), _____ (County), _____ (State), on _____ (Month and day), 19____

I hereby apply for relief from liability for training and service in the land or naval forces of the United States.

Dated this _____ day of _____, 194__

Subscribed and sworn before me this _____ day of _____, 194__

_____
(Signature of registrant)

_____
(Signature of officer)

_____
(Designation of officer)

INSTRUCTIONS

This form should be executed by the registrant in duplicate. The local board will transmit the original to the Director of Selective Service through the State Director of Selective Service and will retain the duplicate in the registrant's Cover Sheet (Form 53). (See section 622.43 (b) of the Selective Service Regulations.)

DSS Form 301 (Revised 1–2–43)

U. S. Government Printing Office 16—23414–2

MARCH 24, 1943.

In reply refer to
Le 811.2222 (1940)/3736

Maj. Gen. LEWIS B. HERSHEY,
Director, Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I have received your letter of March 17, 1943, suggesting that nationals of neutral countries who claim exemption from military service in the United States under the provisions of a treaty, be permitted to sign a revised Form 301 instead of the Application of Alien for Relief from Military Service, Form 301, No. 16–26414–1, previously used. The new Form 301 is a revision of the revised Form 301 of January 2, 1943, No. 16–26414–2. In the new Form 301 it is proposed to add to the revised Form 301 of January 2, 1943, the following words beneath the line designated for the signature of the registrant:

> The Selective Training and Service Act of 1940, as amended, reads in part—"That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

The Department sees no objection to the new revision of Form 301 or to its use in treaty cases. It is noted that no general distribution of the new form is contemplated but that the Department will be furnished with suitable quantities of the form presumably for distribution to missions of neutral countries whose nationals are entitled to exemption from military service under treaty provisions.

Sincerely yours,

For the Secretary of State:

GREEN H. HACKWORTH,
Legal Adviser.

Le:RTY:AY:SS 3/22/43

LEGATION DE SUISSE,

Washington, D. C.

JANUARY 11, 1943.

The Minister of Switzerland presents his compliments to the Honorable the Secretary of State and with further reference to the Secretary's note of July 6, 1942, concerning the liability of Swiss nationals for military service in the United States, has the honor to submit the following additional cases of non-declarant Swiss citizens for unconditional release from the liability for military service, in conformity with Article II of the Treaty of Friendship, Commerce and Extradition of November 25, 1850:

1. *Arthur Pieter Rosenstein,*
   Address: 140 Riverside Drive, New York, N. Y.
   Order number: 12211–A
   Local Board: No. 44, 1109 Lexington Avenue, New York, N. Y.
2. *Giulio Monleone,*
   Address: 95 Joralemon Street, Brooklyn, N. Y.
   Order number: 12285
   Local Board: No. 133, 129 Montague Street, Brooklyn, N. Y.
3. *Gerard Henri Demaurex,*
   Address: 307 Produce Exchange, 2 Broadway, New York, N. Y.
   Order number: S1563–B
   Local Board: No. 30, 201 West 89th Street, New York, N. Y.

The required letters of the above registrants to the Director, Selective Service System, in which they request to be unconditionally relieved of the liability for military service under the provisions of Article II of the Treaty of 1850, are herewith enclosed.

Mr. Gerard Henri Demaurex, named above under number 3, has further informed the Legation that in order not to be inducted into the United States armed forces he had already been required by his Local Board to file Selective Service Form 301 "Application by Alien for Relief from Military Service", with the consequence, however, that he will be debarred forever from becoming an American citizen.

The Minister would appreciate it if the Secretary would ask the competent authority to have this form returned to Mr. Demaurex.

3 Enclosures.

WASHINGTON, D. C., *December 31, 1942.*

JANUARY 11, 1943.

In reply refer to
Le 811.2222 (1940)/2692

Maj. Gen. LEWIS B. HERSHEY,
Director, Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I am enclosing a copy of a note of December 31, 1942 from the Legation of Switzerland and its enclosures claiming the exemption from military service under the Selective Training and Service Act of 1940 of certain persons therein listed who are said to be non-declarant aliens of Swiss nationality.

The Department has previously expressed the view that under the provisions of Article II of the Treaty of Friendship, Commerce, and Extradition, concluded on November 25, 1850 by the United States and Switzerland Swiss nationals in the United States are exempted from military service. I shall appreciate being advised of the result of your investigation of the cases referred to in the Legation's note and of the action taken thereon in order that the Legation may be informed.

Sincerely yours,
For the Secretary of State:
GREEN H. HACKWORTH,
Legal Adviser.

Enclosure:
From Legation of
Switzerland, December 31,
1942 and enclosures.

Le:RTY:MEB:SS 1/6/43

JANUARY 11, 1943.

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and acknowledges the receipt of his note of December 31, 1942, and its enclosures requesting the exemption from military service in the United States of certain persons listed therein who are said to be nondeclarant Swiss citizens.

The cases have been referred to the appropriate agency of the Government for investigation and upon the receipt of a report thereon the Secretary of State will communicate with the Minister.

DEPARTMENT OF STATE,
WASHINGTON, *January 11, 1943.*

811.2222(1940)/2692
Le:RTY:MEB:SS 1/6/43

(A43)

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
Washington, D. C.

In replying address
The Director of Selective Service
and Refer to No.
9-3.4-97

The Honorable
The SECRETARY OF STATE

Subject: Gerard Henri Demaurex
Local Board No. 30
New York, New York

MY DEAR MR. SECRETARY: Reference is made to your letter of January 11, 1943 (Your reference: Le 811.2222 (1940)/2692), enclosing a copy of a note dated December 31, 1942, from the legation of Switzerland in which it was claimed that several registrants who are citizens of Switzerland are exempt from military service in the United States by reason of a treaty between the United States and Switzerland. The name of the above registrant was listed in the note and a letter to the Director of Selective Service from the registrant was also enclosed. It was explained in the note and letter that the registrant had previously filed an Application by Alien for Relief from Military Service (Form 301). Apparently, the registrant now desires to withdraw or revoke the Form 301 and claim exemption under the treaty.

Under the Selective Service Regulations, Forms 301 are sent from local boards to this office and

from here transmitted to the Immigration and Naturalization Service, Philadelphia, Pennsylvania. Our records indicate that the one executed by this subject was transmitted to the Immigration and Naturalization Service on November 20, 1942.

On prior occasions we have been advised by the Immigration and Naturalization Service, and we concur in the opinion, that there is no provision in the Selective Service law authorizing the revocation or withdrawal of a Form 301 after it has been filed. It appears, therefore, that the proper action to be taken is to make the Legation's note and the registrant's letter a part of the registrant's file with the Immigration and Naturalization Service so that such can be given consideration when and if the registrant files a petition for naturalization.

A copy of this letter together with a copy of the Legation's note and the registrant's letter is being sent to the Immigration and Naturalization Service.

Sincerely yours,

(S) LEWIS B. HERSHEY,
Director.

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and refers to his note of December 31, 1942, requesting the exemption from military service of certain Swiss citizens. With reference to Gerard Henri Demaurex it was stated that he had filed with his local board Selective Service Form 301 and the request was made that this form be returned to him.

The Secretary of State is now advised by the Selective Service authorities as follows concerning Mr. Demaurex:

> Under the Selective Service Regulations, Forms 301 are sent from local boards to this office and from here transmitted to the Immigration and Naturalization Service, Philadelphia, Pennsylvania. Our records indicate that the one executed by this subject was transmitted to the Immigration and Naturalization Service on November 20, 1942.
>
> On prior occasions we have been advised by the Immigration and Naturalization Service, and we concur in the opinion, that there is no provision in the Selective Service law authorizing the revocation or withdrawal of a Form 301 after it has been filed. It appears, therefore, that the proper action to be taken is to make the Legation's note and the registrant's letter a part of the registrant's file with the Immigration and Naturalization Service so that such can be given consideration when and if the registrant files a petition for naturalization.

A copy of this letter together with a copy of the Legation's note and the registrant's letter is being sent to the Immigration and Naturalization Service.

DEPARTMENT OF STATE,

Washington, March 31, 1943

811.2222(1940)/3779
Le:RTY:JBA:SS
3/29/43

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET N. W.
Washington, D. C.

11–4.8–106

DIRECTOR OF SELECTIVE SERVICE FOR
NEW YORK CITY,
1 East 44th Street,
New York, N. Y.

Subject: Jean-Pierre Fatzer
Order No. 12308
Local Board No. 44
New York, New York

DEAR COLONEL MCDERMOTT: The above subject claims the right to exemption from service in our armed forces under the terms of a treaty between the United States and the Government of Switzerland, of which country he claims to be a national.

His file is returned herewith, and you are requested to instruct the local board to inform the subject that his application for relief from military service must be made on his behalf by the Embassy of his government, through our State Department. A revised Form 301, issued under the Regulations in accordance with section 3 (a) of the Selective Training and Service Act of 1940, as amended, will be given to the subject by the Embassy of his government for execution and proper filing by him with the local board.

It is to be noted that the above applies only to those neutrals claiming exemption by virtue of a treaty. Form 301, now in your possession, may be used by the local boards in accordance with section 622.43 of the Regulations, for execution by all those neutrals not claiming exemption by virtue of a treaty.

For The Director,

ROBERT B. COONS,
Lieutenant Colonel, AUS,
Assistant Chief, Manpower Division.

Enclosure

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, N. W.
Washington, D. C.

APRIL 10, 1943.

The Honorable
The SECRETARY OF STATE

Subject: Rights of Treaty Aliens
Your Reference Le 811.2222
(1940)/3425

MY DEAR MR. SECRETARY:

This is in reply to your letter of February 27, relating to the right of the following registrants to relief from military service in our armed forces, by virtue of a treaty between this Government and the Republic of Switzerland:

Jean-Pierre Fatzer
Arthur Job
Peter Staeger

The respective local boards of the first two registrants above listed are being directed to instruct them to apply to the Legation of Switzerland for DSS Forms 301, heretofore approved by the Department of State, which each registrant is required to execute and file with the local board in which he is registered. Copies of our letters to the State Directors are enclosed herewith.

Peter Staeger has heretofore filed a Form 301 and is therefore relieved from liability for service.

Sincerely yours,

[S] LEWIS B. HERSHEY,
Director.

Enclosures

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

AMERICAN LEGATION,
Bern, June 30, 1943

No. 5470

Subject: Transmitting text of statement by Federal Councillor Pilet-Golaz on June 9, 1943, concerning liability of Swiss citizens in United States to perform military service.

The Honorable
The SECRETARY OF STATE,
Washington.

SIR: I have the honor to transmit herewith the text and translation of a statement by Federal Councillor Pilet-Golaz, Chief of the Federal Political Department, answering a question in Parliament concerning liability to American military service of Swiss citizens resident in the United States.

M. Pilet-Golaz's explanatory statement before the Council of State on June 9 was made in connection with parliamentary consideration of the annual report of the Federal Political Department for 1942. Copies of the latter, which had referred to representations by the Swiss Government in regard to the recruitment of citizens of Switzerland in the United States for service in the armed forces of the United States, were

transmitted to the Department with my despatch No. 4947 of May 5, 1943.

An Italian radio broadcast on June 10 referred to the Swiss Foreign Minister's statement and sharply criticized the treatment of Swiss nationals in the United States: M. Bonna, Chief of the Division of Foreign Affairs of the Federal Political Department, has made a point of bringing to my attention the text of the stenographic record of M. Pilet-Golaz's remarks on this subject, and in a conversation on June 10 with Mr. Huddle, Counselor of the Legation, he stated that the Italian radio broadcast had grossly misrepresented the statement by M. Pilet-Golaz and that he (M. Bonna) desired that there should be no misunderstanding on the part of the American Government regarding the position of M. Pilet-Golaz in this matter.

Respectfully yours,

(S) Leland Harrison,
LELAND HARRISON.

Enclosures:-
Text of statement by
M. Pilet-Golaz;
Translation.

File No. 800
DFB/mk
In quintuplicate to Department

(Enclosure to despatch No. 5470, June 30, 1943)

TRANSLATION

Council of States, Session of June 9, 1943.

M. PILET-GOLAZ, *Federal Councillor:*

This being said, I come to the question which was put to me by the Ways and Means Commission of your Council which concerns the obligation for Swiss citizens having acquired the American nationality to perform a period of military instruction and also to serve in time of war in the American army.

I believe the question is based on the Commission's own information. Had I been advised earlier, I could have pointed out to it that the situation is not quite as described.

The discussions which we are having at present with the United States do not essentially concern individuals having dual nationality. In their case, the situation is unfortunately very clear, if not always very agreeable. It is the fate of dual-nationals, in time of war, to be considered by each country of which they are citizens, and in such country, as nationals and not as foreigners. In a country whose nationality one has acquired—it is an undisputed principle—one cannot claim another nationality. A Swiss in Switzerland is Swiss; a Frenchman in France is only French; an American in America is only American. You will find no exception to this conception or in the application of this rule. Consequently the Swiss-Americans who live in the United States are con-

sidered by the American Government as Americans just as the Americans who live in Switzerland are considered by us as Swiss. I repeat that this is not only true as concerns the United States but it applies to all countries which recognize dual nationality. From a legal viewpoint, there is no possible discussion on that point. As a matter of fact, there have always been arrangements, accommodations or facilities granted, and the negotiations concern the importance and the extent of those accommodations and facilities.

The United States have even gone further in this matter and here is where the problem becomes difficult. A law adopted on December 20, 1941—several weeks after the entry of the United States into the war—extends compulsory military service to all foreigners established in the United States, not only to those having double nationality and who are American citizens, but to all foreigners, even neutrals. Foreigners may, however, be exempted from this obligation by registering a declaration to the effect that they have no intention of acquiring, and definitely renounce any intention of acquiring, American nationality. For example, a Swiss residing in the United States who, in compliance with the law of December 20, 1941, has been drafted, could say, under this law: "I am not American, I do not wish American nationality and I renounce any intention of acquiring it." It goes without saying that Swiss who have lived for a long time in the United States and who probably expect to continue their career there do not gladly make such a declaration. That law put them in an

extremely difficult dilemma and that is the reason why we have taken up the matter. Up to now, our negotiations have achieved the following result: Swiss who are established in the United States are no longer required to make a declaration renouncing the nationality, but merely a declaration according to which they do not intend to do military service in the United States. At once, they are liberated and exempted from the draft. We hoped that the assurance given us by the Government of the United States would have a general character, in other words that it might apply automatically to all Swiss citizens, whereas what was granted to us was only applicable in individual cases: each Swiss established over there must make a request to receive the benefit of the provisions of the law in question.

We are continuing our efforts in order to obtain, if possible, that this facility be given a general instead of an individual and casual character.

Since I have approached this problem, I will add that we have similar difficulties with Canada. In the fall of 1942, Canada, although much later than the United States, adopted a similar law and our efforts in that country aim at obtaining a situation at least equal to that which we have been able to settle with the United States of America.

Those are the explanations which I am able to give the Council on that question.

In reply refer to
Le 811.2222(1940) Moser, Paul

FEBRUARY 4, 1944.

Maj. Gen. LEWIS B. HERSHEY,
Director, Selective Service System,
Washington, D. C.

MY DEAR GENERAL HERSHEY: I am enclosing a copy of a note of January 27, 1944 from the Legation of Switzerland and its enclosure claiming the exemption from military service under the provisions of the Selective Training and Service Act of 1940 of Paul Moser, who is said to be a non-declarant alien of Swiss nationality.

The Department has previously expressed the view that under the provisions of Article II of the Convention of Friendship, Commerce and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service. I shall appreciate being advised of the result of your investigation of the case referred to in the Legation's note and of the action taken thereon in order that the Legation may be informed.

Sincerely yours,
For the Secretary of State:

GREEN H. HACKWORTH,
Legal Adviser.

Enclosure:
From Legation of Switzerland,
January 27, 1944, with enclosure.

Le:RTY:FHH:SS
2/3/44

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
21ST STREET AND C STREET, NW.
Washington 25, D. C.

FEBRUARY 12, 1944.

The Honorable
The SECRETARY OF STATE

Subject: Paul Moser
Local Board No. 14
New York, New York
Your Reference: Le 811.2222
(1940)

MY DEAR MR. SECRETARY: Reference is made to your letter of February 4, 1944 regarding the above-named registrant.

We are instructing his local board to inform him that he may obtain from the Legation of Switzerland an Application by Alien for Relief from Military Service (Form 301, Revised), which form has previously been approved by you.

Sincerely yours,

(S) LEWIS B. HERSHEY,
Director.

The Secretary of State presents his compliments to the Honorable the Minister of Switzerland and has the honor to refer to his note of January 27, 1944 requesting the exemption from military service of Paul Moser, a Swiss national.

The Secretary of State is now advised by the Director of Selective Service to whom the case was referred for investigation that the registrant's local board has been instructed to inform him that he may obtain from the Legation an Application by Alien for Relief from Military Service, DSS Form 301, which each such registrant is required to execute and file with his local board.

DEPARTMENT OF STATE,
Washington, February 25, 1944.

811.2222(1940) Moser, Paul
Le:RTY:FHH:SS
2/24/44

931169—51——12

DEPARTMENT OF STATE

MEMORANDUM OF CONVERSATION

DATE: 11/19/43.

Subject: Right of Costa Ricans in the United States to exemption from military service.

Participants: Colonel Dargusch, Colonel Shattuck, Lieut. Colonel Glen Parker, Captain Lewis, Selective Service System, Mr. Yingling, Le.

Copies to:

In view of General Hershey's letter of October 29, 1943 indicating the intention of the selective service authorities to treat Costa Rican cases on the same basis as other alien registrants in spite of their claims to exemptions on treaty grounds, I asked for an opportunity to discuss the matter with Selective Service authorities.

At the conference in Colonel Dargusch's office I stated that it is the Department's desire to carry out the treaty obligation of this Government that a satisfactory solution had been arrived at in the cases of neutral aliens in spite of the divergent views of the Department and the Selective Service System on the legal questions involved, and that I hoped that it would not be necessary to dishonor our treaty obligations to Costa Rica in order to obtain the services of some dozen Costa Ricans in whose behalf the Costa Rican Government has claimed exemption from military service on treaty grounds. I pointed out that under the

Selective Service Law, the President can exempt from registration and service additional categories of persons than those specifically exempted and that under Selective Service regulations the Director of Selective Service is also authorized to exempt from registration and service, individuals or categories of persons. The Selective Service officials present were appreciative of the Department's problem but did not feel that the President's power should be exercised to exempt a few Costa Ricans since the exemption would have to be in general terms and might result in exempting other aliens who are entitled to such exemption on treaty grounds but have not claimed it. They did not feel that the Director's power of exemption could be exercised in cases of persons who in their view are liable for service under the Selective Service law.

I asked whether the Costa Ricans who have claimed exemption on treaty grounds have been given physical examinations to determine their fitness for military service. Colonel Parker indicated that this had not been done, and I suggested that such examination might eliminate some of the cases from further consideration by their local boards if it were found that the persons concerned were unfit for service. It was agreed that appropriate instruction should be issued to have the persons referred to given preinduction physical examinations with the caution that they were not to be inducted until further instructions from the Director of Selective Service. It was further agreed to suggest, informally, to the War Department, the rejection of those

Costa Ricans entitled to exemption on treaty grounds who cannot be rejected on physical grounds as the War Department can reject any person not acceptable to it for military service. This whole procedure is to be carried out informally, and it is hoped thereby to dispose of the small number of cases involved in a manner satisfactory both to the Department and the Selective Service System.

811.2222(1940)/5152
Le: RTYingling; MET: IIG: SS
11/19/20/43

FEBRUARY 11, 1944.

In reply refer to
Le 811.2222(1940)—Malavasi, Carlos

The Hon. FRANK KNOX,
Secretary of the Navy.

MY DEAR MR. SECRETARY: As you are aware the Selective Training and Service Act of 1940, as amended, makes every male citizen of the United States and every other male person residing in the United States who is within certain specified ages, liable for training and service in the land or naval forces of the United States.

This Government is a party to certain treaties with foreign governments which contain provisions exempting the nationals of such foreign governments from military service in the United States and granting exemption to American citizens from military service on a reciprocal basis.

For some time the Department has been receiving from foreign missions in this country requests for the exemption of their nationals from military service under such treaty provisions. The requests have been transmitted to the Director of Selective Service who, when they have been received in time, has taken steps to stay induction. In some cases, however, the requests are received too late to stay induction or relate to people who have already been inducted.

The Department has been advised by the Director of Selective Service that Carlos Malavassi a Costa Rican citizen was inducted on December 13, 1943 and the Costa Rican Embassy states that he is at present serving in the United States

Navy and is assigned to Company 1024 at Camp Waldron, United States Naval Training Station, Farragut, Idaho. The Ambassador of Costa Rica has requested the exemption from military service of Mr. Malavassi under the provisions of Article IX of the Treaty of Friendship, Commerce and Navigation concluded by the United States and Costa Rica on July 10, 1851.

For your information Article IX provides in part as follows:

> The citizens of the United States residing in the Republic of Costa Rica, and the citizens of the Republic of Costa Rica residing in the United States, shall be exempted from all compulsory military service whatsoever, either by sea or by land, * * *.

The Department considers that Mr. Malavassi is exempted from military service in the United States under these treaty provisions. I shall appreciate being advised whether he may be discharged from service in the Navy.

Sincerely yours,

EDWARD R. STETTINIUS, Jr.,
Acting Secretary.

Le: RTY: FHH: SS
2/5/44

FEBRUARY 17, 1944.

In reply refer to Le

The Hon. HENRY L. STIMPSON,
Secretary of War.

MY DEAR MR. SECRETARY: The Ambassador of Costa Rica has requested the exemption from military service under the provisions of the Selective Training and Service Act of 1940 of a small number of Costa Ricans residing in the United States. The requests were referred to the Director of Selective Service and the Department is now informally advised that after pre-induction physical examinations of such persons the following have been classified as indicated and will be processed for induction:

José Gonzalez—Local Board No. 103—Class 1-A,
Carlos Cruz—Local Board No. 26—Class 1-A,
Carlos Pattoni—Local Board No. 35—Class 1-A-L, and
Ralph Vieto—Local Board No. 27—Class 1-A-L, all of New York City.

The Department considers that Costa Ricans in the United States are exempted from military service under Article IX of the Treaty of Friendship, Commerce and Navigation concluded by the United States and Costa Rica on July 10, 1851, which provides in part as follows:

> The citizens of the United States residing in the Republic of Costa Rica, and the citizens of the Republic of Costa Rica

> residing in the United States, shall be exempted from all compulsory military service whatsoever, either by sea or by land, * * *.

The Department will appreciate your cooperation in carrying out the treaty obligations of this Government in the cases referred to above.

Sincerely yours,

EDWARD R. STETTINIUS, Jr.,
Acting Secretary.

Le:RTY:FHH:EH:SS 2/10–11/44

MAY 6, 1944.

UNRESTRICTED

No. 518

EDWARD G. TRUEBLOOD, ESQ.,
American Chargé d'Affaires ad interim,
San José.

SIR: Your attention is called to the following situation concerning military service of Costa Rican nationals residing in the United States:

The Costa Rican Embassy has from time to time requested the exemption of Costa Rican nationals from military service under the provisions of Article IX of the Treaty of Friendship, Commerce and Navigation concluded by the United States and Costa Rica on July 10, 1851. The Director of Selective Service has now informed the Department that he cannot agree that Costa Rican nationals are entitled to exemption from military service under the treaty, that the conflict between the provisions of the treaty and the Selective Service law is a matter that has engaged the careful attention of Selective Service authorities for some time, and that they have not been able to arrive at any conclusion which would permit them to exempt the nationals of Costa Rica from military service. In these circumstances, and before determining what further action should be taken, the matter was discussed informally with the Costa Rican Embassy here. The Embassy was informed that the Department would like to be advised whether, in

view of its cobelligerency, Costa Rica still desires to invoke the treaty provisions referred to above in behalf of Costa Ricans residing in the United States. In this connection it was pointed out that other cobelligerents do not object to the service of their nationals in the armed forces of the United States, but that with most of such cobelligerents military service agreements have been concluded under the terms of which their nationals, who are called for military service in this country, have the opportunity to elect to serve in the armed forces of their own country.

The Embassy was further informed that the Department would also like to be advised whether in the event Costa Rica intends to continue to invoke the treaty provisions referred to in behalf of its nationals, it will do so in the cases of Costa Ricans who have declared their intention to become American citizens. In this connection it was stated that the Department felt that the Costa Rican Government would perhaps not desire to interest itself in behalf of such persons, since they have taken up a permanent residence in the United States and have taken steps to acquire American citizenship. It was pointed out that one of the neutral countries whose nationals are exempted from military service in the United States under treaty provisions voluntarily indicated to the Department that it did not intend to invoke the treaty in behalf of declarants, and its practice has conformed to that policy. Should the Department request the President to specify other categories of persons in addition to those specified in the

Selective Service Act as exempt from liability for registration and service, its request would have to be confined to persons who are not citizens of the United States, and who have not declared their intention to become citizens of the United States as the President is not empowered by the Act to exempt citizens or declarants.

The above is furnished for your information and as a basis for informal discussions with the Foreign Office should you consider such action desirable. It should be borne in mind throughout that the Department is only desirous of ascertaining the attitude of the Cost Rican Government on the questions raised. The Department considers that the treaty is in effect and has raised no question concerning the right of Costa Ricans in the United States to exemption from military service under the provisions thereof.

Very truly yours,

For the Secretary of State:

G. HOWLAND SHAW.

Le:RTY: CSS 5/3/44

OCTOBER 9, 1944.

UNPESTRICTED

No. 704

S. WALTER WASHINGTON, ESQ.,
American Chargé d'Affaires ad interim, San José.

SIR: The Department refers to your despatch no. 1691 of July 26, 1944, in reply to its instruction no. 518 of May 6, 1944, concerning military service of Costa Rican nationals residing in the United States.

The Ambassador of Costa Rica recently called at the Department to discuss this matter and stated that he had received from the Foreign Office his Government's reply to our request for advice as to whether Costa Rica intended to continue to invoke the treaty provisions exempting its nationals in the United States from military service and if so whether it intended to include declarants. He was told that the Department had received the reply from the Embassy and in response to his request for the Department's comments on the proposals therein, he was informed that while the Department appreciated the desire of his Government to cooperate in working out an arrangement for the disposal of these cases it was felt that the proposals were impracticable of adoption by Selective Service and that since the Costa Rican Government still intended to request exemption of its nationals who entered the United States prior to March 29, 1943, the problem of obtaining such exemp-

tion in view of the position of the Selective Service authorities concerning the treaty remained unsolved. The Ambassador was advised that if his Government could see its way clear not to request the exemption of declarant Costa Ricans we could probably obtain the exemption of other Costa Ricans by Presidential action. The Ambassador stated that he would explore that possibility further and let us know. Nothing further has been heard concerning the matter up to this time.

The Department has since requested the President to designate treaty aliens as exempt from military service in the United States as is provided for in Section 5 (a) of the Selective Service Act and he has complied with the request. Since the President is prohibited by the Act from exempting American citizens and persons who have declared their intention to become such his action will not result in the exemption from military service of Costa Ricans who have declared their intention to become American citizens.

Very truly yours,

For the Secretary of State:

G. HOWLAND SHAW.

811.2222(1940)/7-2644
Le:BTY:LSV 10-3-44

RESTRICTED

AUGUST 18, 1944.

No. 468

RICHARD FORD, ESQ.,
American Chargé d'Affaires ad interim,
Tehran.

SIR: The Department has received your despatch no. 1033 dated July 21, 1944 enclosing a copy in translation of a note verbale of July 15, 1944 from the Ministry of Foreign Affairs concerning the liability of Iranian subjects to military service in the United States.

The Ministry refers to the fact that Iranian nationals in the United States are being called for military service and requests their exemption from such service in view of paragraph 2 of the provisional agreement between the United States and Persia effected by an exchange of notes dated May 14, 1928, since American nationals are not required to perform military service in Iran.

The pertinent provisions of section 2 of the agreement are that:

> After May 10, 1928, Persian nationals in the United States, its territories and possessions, shall, on a basis of complete reciprocity, be received and treated in accordance with the requirements and practices of generally recognized international law.

Under these provisions it is immaterial whether American nationals are drafted by Iran unless

under generally recognized international law the United States is prohibited from drafting Iranians. This Government does not admit that it is prohibited by international law from drafting aliens residing here.

Under the provisions of the Selective Training and Service Act of 1940, as amended, all male non-citizens within specified ages residing in the United States are made liable for military service unless specifically exempted therefrom. Thus Iranian nationals residing in the United States are made liable for military service here. Even though such persons had heretofore been exempted from such service under the provisions of the agreement of May 14, 1928 such provisions would now be ineffective to exempt them from such service in view of the understanding set out in the penultimate paragraph of Minister Philip's note of that date to the effect that "should the Government of the United States be prevented by future action of its legislature from carrying out the terms of these stipulations the obligations thereof shall thereupon lapse."

You will please reply to the Ministry of Foreign Affairs in accordance with the foregoing.

Very truly yours,

For the Secretary of State:

G. HOWLAND SHAW.

811.2222(1940)/7–2144
Le:RTY:REH:BG:SS 8/10 8/14 ME PR

MEMORANDUM

In view of the request contained in the Swiss Legation's Aide-Memoire of November 1, 1945, the Department has given consideration to the question of the effect which H. R. 390 (Act of October 29, 1945—Public Law 205—79th Congress—Chapter 437—1st Session) will have upon the cases of Swiss citizens, desiring to enter the United States, who claimed exemption from military training and service in the Armed Forces of the United States under the Treaty of Friendship and Commerce of 1850, concluded between the United States and Switzerland, and who pursuant to Section 3 (a) of the Selective Training and Service Act of 1940, as amended (55 Stat. 845), applied for relief from training and service in the Armed Forces of the United States as citizens of a neutral country.

The Act of October 29, 1945, amends Section 28 (c) of the Immigration Act of 1944 so as to delete from the provisions of that section those enumerated statutes either repealed or superseded by more recent legislation, and to include within the definition of the term "ineligible to citizenship" those citizens or subjects of neutral countries who, by having filed applications for exemption from military training and service in the Armed Forces of the United States in the manner prescribed by Section 3 (a) of the Selective Training and Service Act of 1940, as amended, rendered themselves ineligible to citizenship.

Section 13 (c) of the Immigration Act of 1924, as amended, reads as follows:

> No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d) and is accompanying or following to join him, (3) is not an immigrant as defined in Section 3, * * *.

In the administration of the Act of October 29, 1945, in the light of the provisions of Section 13 (c) of the Immigration Act of 1924, as amended, it appears that no immigration visa may be issued an alien who has applied for relief from military training and service pursuant to Section 3 (a) of the Selective Training and Service Act of 1940, as amended, unless such alien's case falls within one of the categories which Section 13 (c) provides may be admitted.

The categories of aliens "ineligible to citizenship" which Section 13 (c) provides may be admitted into the United States are (1) nonimmigrants of all types, (2) an immigrant previously lawfully admitted into the United States for permanent residence who is returning from a temporary visit abroad, (3) an alien who can qualify under the provisions of Section 4 (d) of the Immigration Act of 1924 as a minister or professor or the wife or unmarried minor child, under eighteen years of age, of such person who is accompanying or following to join him and,

931169—51——13

(4) a bona fide student who can qualify as such under the provisions of Section 4 (e) of the Immigration Act of 1924.

It is to be noted that none of the legislation mentioned above in any manner deprives Swiss citizens of the privileges or exemptions enjoyed under the Treaty of Friendship and Commerce concluded between the United States and Switzerland in 1850, including that provision of the Treaty to the effect that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service." While Swiss citizens are exempt from military service, there is no provision in the Treaty relating to the qualifications of nationals of one of the countries to become citizens of the other. Naturalization questions are outside the purpose and purview of the Treaty.

DEPARTMENT OF STATE,
Washington, November 28, 194

(COPIES: FHM)
(COMPARED: /s/ GER)

THE WHITE HOUSE,
Washington, 16 August 1946.

Memorandum for the ACTING SECRETARY OF STATE:

There has been considerable correspondence regarding the matter of citizens of countries with whom we have bilateral treaties relative to their liability for military service. The President has not had time to go into the various fine details of the argument, but his position is as follows:

He is of the opinion that now that direct participation in war has ceased, the aliens of the four or five countries with which we have bilateral treaties residing in the United States should be excused from Selective Service. He feels that this would make for good feeling and that the number of men that would be lost to military service would be infinitesimal. He also, however, is of the strong opinion that anyone excused from military service by virtue of these agreements, both during the war and after, should be forever excluded from attaining citizenship.

In this matter he is very definite in his opinion, and he has directed that I convey it to you.

(S) HARRY H. VAUGHAN,
Major General, U. S. Army,
Military Aide to the President.

The Hon. DEAN ACHESON,
Acting Secretary of State,
Department of State, Washington, D. C.

(Dictated but not signed before departure August 16)
(COPIED: FHM)
(COMPARED: /s/ GER)

DEPARTMENT OF STATE

WASHINGTON

MAY 22, 1948

In reply refer to
L/E

The Hon. CHAN GURNEY,
Chairman,
Armed Services Committee,
United States Senate.

MY DEAR SENATOR GURNEY: Reference is made to the provisions of section 4 (a) of S. 2655, recently reported by the Armed Services Committee, relating to the liability of aliens to military service.

It has long been the policy of the United States Government to provide for the exemption of certain aliens from military service. In view especially of the desirability of assuring exemption from forced service in foreign armies for representatives of American business and other United States citizens abroad, exemptions from military service applicable to both contracting parties have been incorporated, in one form or another, in numerous commercial treaties during the past hundred years. Moreover, some exemptions for aliens have been included in the United States military service legislation during the two world wars of this country. Since the close of actual hostilities in world war II, two commercial treaties containing such exemptions have been signed, one with China in 1946 and one with Italy in 1948, both of which are now being considered by the Senate Committee on Foreign Relations.

As is indicated in the attached memorandum comparing the exemptions from military service provided for aliens in treaties and legislation of the United States, in both world war I and world war II the failure of the military service legislation to provide exemptions as broad as those contained in certain treaties led to the embarrassment of diplomatic representations by the countries with which the treaties had been concluded. Although S. 2655 now contains a broad exemption, its subsequent amendment, perhaps very quickly in time of emergency, along the lines of the draft legislation in effect during world war I and world war II would raise similar questions under some of the treaties. Such changes in Congressional policy as to the exemption of aliens from military service make it extremely difficult for this Department to draft such treaty provisions in a manner which will at all times accord with the legislation on the subject.

Therefore, recognizing that it has long been the legislative policy to exempt some aliens from military service and the desirability of utilizing this policy to obtain by treaty for United States citizens the broadest possible exemption from military service abroad, the Department of State considers it desirable to include, in this basic legislation now before the Senate, a general exemption from military service of aliens to the extent that such exemption is required by the provisions of any treaty to which the United States is a party. If such a provision remained part of the military service legislation, it would prevent any conflict with treaty obligations, irrespective of

any changes in the general policy as to the drafting of aliens. The treaty provisions covered would be in formal treaties which are submitted to the Senate for its advice and consent before being put into force.

The proposal contained herein has been discussed with Secretary Forrestal's office, and the substance of this letter has been sent to that office. Because of the urgency of the matter this report has not been cleared with the Bureau of the Budget but a copy is being sent to the Bureau.

Sincerely yours,

For the Secretary of State:

CHARLES E. BOHLEN,
Counselor.

Enclosure: Memorandum.

The policy as to the inclusion of military service provisions in commercial treaties in relation to recent legislation

Basic policy

Among the purposes of treaties of friendship, commerce and navigation are (a) the establishment of a formal basis on which American citizens may freely move about the world in pursuit of their lawful affairs without fear of detention or abuse of their persons, and (b) the building of a legal environment in which interchange of personal skills and knowledge, as well as goods, services, and capital, can thrive. Some guarantee against impressment by the foreign military is one of the elements of the foundation on which this Government's commercial foreign policy is

built. The treaty rule against the conscription of aliens is, therefore, directed toward the same objectives as the rules for the protection of persons and property, for the payment of compensation for property taken for public use, and for the humane treatment of persons taken into custody by the police authorities. Moreover, like most provisions inserted in commercial treaties, the provisions must be mutual, giving the same standard of protection to nationals of the other country in the United States as is asked for Americans abroad.

It is particularly important to regard this problem from the viewpoint of Americans abroad. Forced service in certain armies of the world would, in effect, be cruel treatment for American citizens.

The obligation of military service is especially associated with the idea of national loyalty. The American who goes abroad in the interest of American foreign trade, of world economic development, or of international cultural cooperation should not be obliged by any policy of this Government to abandon his primary loyalty to the United States. If foreign governments follow the practice of requiring an oath of allegiance from conscripts (as in the United States, under pain of severe penalties), a policy of allowing Americans to be conscripted abroad might be considered a policy of sanctioning the involuntary expatriation of American citizens. Moreover, it is not believed that the United States should, through a policy of impressment into military service, force nationals of other

countries, similarly attaching loss of nationality to the taking of an oath to the United States, to divest themselves of their nationality.

Pre-World War I Treaties

A number of United States treaties concluded prior to world war I contained broad provisions for exemption from military service without any qualification as to (1) whether or not the nationals of a contracting party claiming exemption under the treaty within the other contracting party had declared their intention to become citizens of such other contracting party or (2) whether or not the two contracting parties were both at war with the same third country. For example, the first paragraph of article II of the treaty of November 25, 1850, with Switzerland provides on this point:

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service, but they shall be liable to the pecuniary or material contributions, which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service. (11 Stat. 589.)

Other governments have protested against the drafting of their nationals as contrary to international law, and under the municipal law of many countries aliens are not now subject to compulsory military service. It is considered important for the United States, which has for many decades followed the practice of including in its commercial treaties provisions as to such

exemption, to continue to include some such provisions, since a decision by the United States to reverse its long-standing policy in this matter might establish an unfortunate precedent with respect to the drafting of aliens which other governments could be expected to follow. However, due largely to the uncertainties as to what exemptions will be provided by future military service legislation, there has not been satisfactory correlation between the exemptions accorded by treaty and those included in legislation.

World War I Draft

The Selective Service Act of 1917, enacted soon after this country became a belligerent in World War I, made liable for military service:

> male citizens, or male persons not alien enemies who have declared their intention to become citizens (Sec. 2, 40 Stat. 77 and 78.)

Thus all aliens who had not declared their intention to become citizens, that is nondeclarants, were exempt, but declarants were subject to service. At that time the United States had treaties with Argentina, Costa Rica, Honduras, Italy, Japan, Paraguay, Serbia, Spain, and Switzerland providing for exemption from military service. Strong representations were received from some governments against the drafting of declarant aliens under this law. The President, as Commander in Chief, provided for the discharge of neutral aliens drafted into the Army contrary to such treaty provisions, but this proved unsatisfactory since the President

could not act until after the treaty had been violated by the induction of the alien. Consequently, at the proposal of the Department of State, the Act was amended in 1918 by the addition of the following proviso:

> *Provided,* That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States. (40 Stat. 885; see also 3 Hackworth Dig. of Int. Law, 602 to 606, especially letter from the Secy. of State to the House Military Affs. Com., Feb. 14, 1918, ibid. 604 and 605.)

Under this amendment neutral declarants also were exempt from military service provided they gave up the privilege of becoming citizens.

Following World War I a number of commercial treaties were concluded containing military service provisions basing exemption upon the absence of a declaration of intention, in language generally comparable to the following in the 1928 treaty with Norway:

ARTICLE VI

> In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military

> service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such individuals depart from the territories of said belligerent Party within sixty days after a declaration of war. (47 Stat. 2139.)

World War II Draft

The Selective Service Act of 1940, enacted before the United States became a belligerent in World War II, made liable for training and service:

> Every male citizen of the United States, and every male alien residing in the United States who has declared his intention to become such a citizen. (Sec. 3, 54 Stat. 885.)

This was comparable to the 1917 law before its amendment, and again protests were received from the governments of countries with which the United States had treaties providing for the exemption from military service of aliens, whether or not they had declared their intention of becoming citizens. The Department of State proposed an amendment along the lines of the 1918 amendment to the 1917 Act, permitting declarant aliens to be exempt upon the withdrawal of their declarations of intention. The Congress, a few days after the United States became a belligerent in world war II, amended the 1940 act so as to make subject to training and service:

> every male citizen of the United States, and every other male person residing in

> the United States * * *, *Provided*, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States." (55 Stat. 845; see also letters from the Secy. of State to the Pres. of the Senate and the Speaker of the House, April 15, 1941.)

Thus the basis for exemption was completely changed, and throughout the war an alien was exempt if he was a national of a neutral country rather than of a co-belligerent country.

Recent Treaties

This background of wartime legislation was considered as indicative of the policy of this Government as to the liability of aliens to military service, and for this reason has been used as the basis for the drafting of military service provisions in commercial treaties which have been recently concluded and are now being negotiated.

Provisions along these lines, following the wartime practice of the United States, have been included in the treaty of November 4, 1946 with China (art. XIV) and the treaty of February 2, 1948 with Italy (art. XIII), both of which are now before the Senate, as well as in a number of draft treaties which are in various stages of

negotiation. The provision in the Italian treaty provides:

> 1. The nationals of each High Contracting Party shall be exempt, except as otherwise provided in paragraph 2 of this Article, from compulsory training or service in the armed forces of the other High Contracting Party, and shall also be exempt from all contributions in money or in kind imposed in lieu thereof.
>
> 2. During any period of time when both of the High Contracting Parties are, through armed action in connection with which there is general compulsory service, (a) enforcing measures against the same third country or countries in pursuance of obligations for the maintenance of international peace and security, or (b) concurrently conducting hostilities against the same third country or countries, the exemptions provided in paragraph 1 of this Article shall not apply. However, in such an event the nationals of either High Contracting Party in the territories of the other High Contracting Party, who have not declared their intention to acquire the nationality of such other High Contracting Party, shall be exempt from service in the armed forces of such other High Contracting Party if within a reasonable period of time they elect, in lieu of such service, to enter the armed forces of the High Contracting Party of which they are nationals. In any such situation the High Contracting Parties will make the necessary arrangements for giving effect to the provisions of this paragraph.

CH
OK
FDR

SEPTEMBER 25, 1944.

MEMORANDUM FOR THE PRESIDENT

As you well know, the Selective Training and Service Act of 1940 as amended is, by its terms, applicable to both American citizens and resident aliens.

The United States is a party to a number of bilateral treaties with foreign countries containing provisions exempting nationals of the respective countries from military service in the armed forces of the other. We have such treaties with Spain, Switzerland, Costa Rica and other countries. The treaty with Costa Rica, which is indicative of the general nature of the provisions in question, provides that citizens of Costa Rica residing in the United States shall be exempted "from all compulsory military service whatsoever, either by sea or by land".

Section 3 (a) of the Selective Service Act, as amended by the Act approved December 20, 1941, contains a provision that neutral aliens may be relieved from liability for training and service if, prior to their induction, they make application to be relieved in accordance with rules and regulations prescribed by you, but in the event that they take advantage of this procedure they are to be debarred thereafter from becoming citizens of the United States. We are not having great difficulty with neutral countries although they contend that the

inhibition against becoming citizens is in the nature of a penalty and hence is inconsistent with their treaty rights.

In the case of Costa Rica, a cobelligerent country, a different situation obtains. The Selective Service System takes the position that since Costa Rica is not a neutral, nationals of that country cannot be granted exemption on the grounds of alienage.

The matter has been discussed on different occasions with the Costa Rican Government and with its Ambassador here but they continue to insist upon observance of the treaty.

Section 5 (a) of the Act, as amended, after stating classes of individuals to be exempted, provides for the exemption of "persons in other categories to be specified by the President".

Having in mind the insistence of the Costa Rican Government on the observance of the treaty provisions; also having in mind the rule usually applied in the construction of an Act of Congress that it is never to be supposed to override the provisions of a treaty unless its words are so clear that there is no escape from that conclusion, and our traditional policy relating to the observance of treaties, I am wondering whether you would be willing to direct that this class of persons be exempted from the requirements of the Act.

This exemption could not, under the Act, be made to apply to aliens who have declared their intention to become citizens of the United States. It is not believed that very many people would be affected.

If you desire the exemption to be made, I will so

inform the Selective Service, it being understood that such exemption shall be given only in those cases where the request is made by the foreign government and approved by this Department.

CH

811.2222 (1940) Carranza, Armando Joseph.

U. S. GOVERNMENT PRINTING OFFICE: 1951